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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 166.

THE NATIONAL BANK AND LOAN COMPANY OF WATERTOWN, NEW YORK, PLAINTIFF IN ERROR,

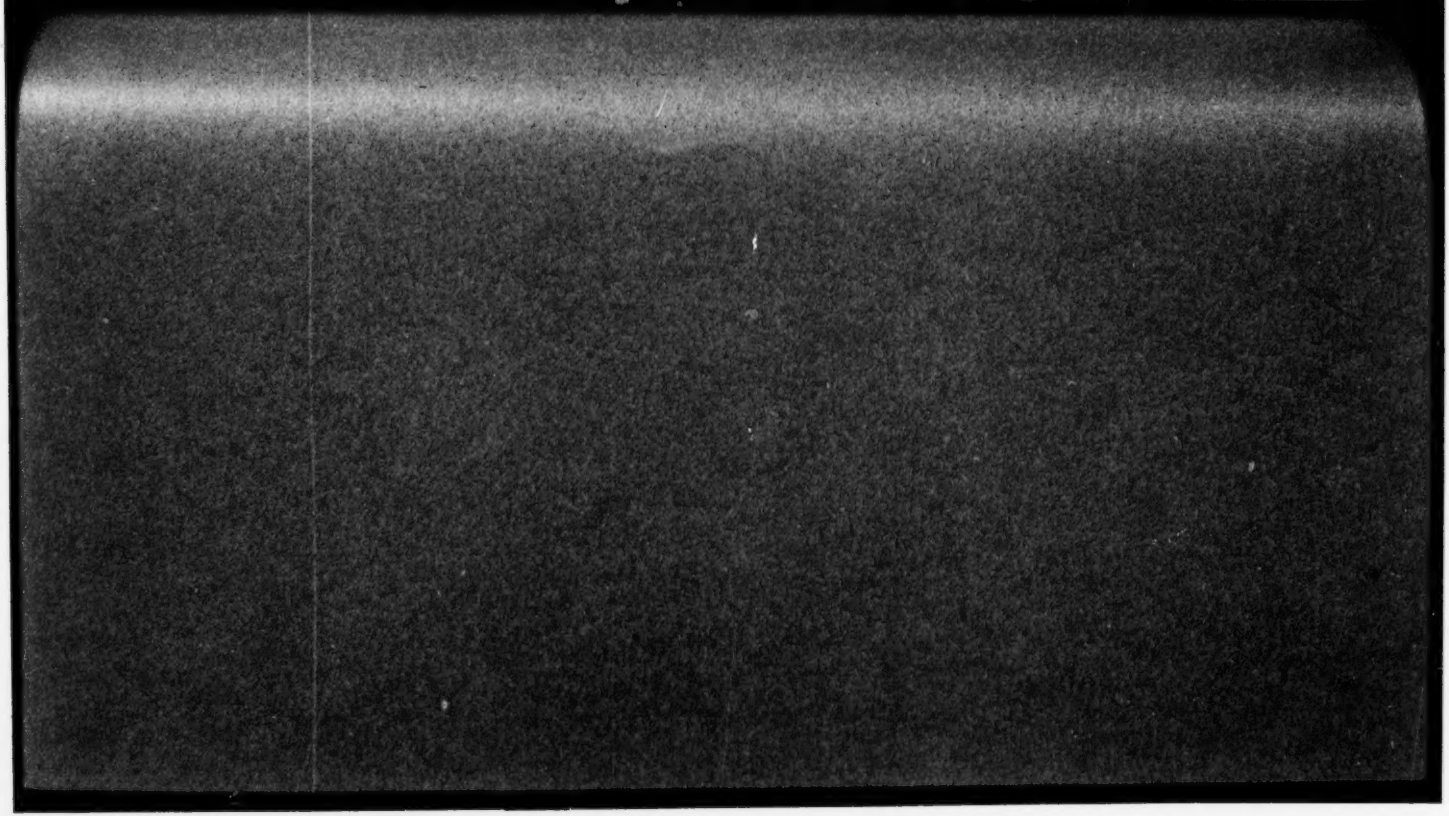
vs.

MOSES PETRIE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 26, 1902.

(16,267.)



(18,267.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 414

THE NATIONAL BANK AND LOAN COMPANY OF WATERTOWN, NEW YORK, PLAINTIFF IN ERROR,

vs.

MOSES PETRIE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a STATE OF NEW YORK, } ss:
Jefferson County Clerk's Office, }

I, E. A. Chapman, clerk of the county of Jefferson and of all the courts of record in and for the said county and of the supreme court and for the fourth judicial department in the county aforesaid, the same being a court of record, do hereby certify and return that the following are true and correct copies of the record, remittitur of court of appeals, judgment-roll, opinions of the court, writ of error and allowance thereof, citation and proof of service thereof and of all the records and proceedings in the action of Moses Petrie against The National Bank and Loan Company of Watertown, N.Y., on file in said clerk's office, and that I have compared the same with the originals thereof on file as aforesaid, and that the same are true and correct transcripts of said originals and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said county and court, at the city of Watertown, Jefferson county, State of New York, this 6th day of September, 1901.

[Seal Jefferson County, N. Y.]

E. A. CHAPMAN, *Clerk.*

b To the Honorable Alton B. Parker, chief judge of the court of appeals of the State of New York:

And now comes The National Bank and Loan Company, of the city of Watertown, in the county of Jefferson and State of New York, by Purcell, Walker and Burns, its attorneys, and complains that in the record and proceedings and also in the rendition of judgment of a plea in the suit between Moses Petrie, plaintiff and The National Bank and Loan Company of Watertown, N. Y., defendant, which is in the supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had remitting to the said supreme court of the State of New York the record in the said suit, with an order affirming the order or judgment of the said supreme court at the appellate division thereof, which order and determination of said appellate division of said supreme court affirmed a judgment rendered by said supreme court at a trial term held in the county of Jefferson in said State, in favor of the plaintiff and against the defendant, and entered in the clerk's office of the county of Jefferson on the 15th day of October, 1898, for $784.31, and said court of appeals directed that the same be enforced, upon which direction a judgment of affirmance was entered in said supreme court of the State of New York on the 27th day of May, 1901, for $112.01, costs.

In and by the answer or plea in said action interposed by the said, The National Bank and Loan Company to the plaintiff's complaint and cause of action, the said defendant The National Bank and Loan Company set up, claimed and asserted a right, privilege,

defense or immunity under and by virtue of an act of Congress of the United States, to wit, the act entitled "An act to provide a national currency secured by a pledge of United States bonds
c and to provide for the circulation and redemption thereof," passed June 3rd, 1864, and the several acts supplemental thereto and amendatory thereof, and the decision of the said court of appeals and the said supreme court is against the right, privilege, defense or immunity so specially set up and claimed by said defendant.

The said defendant being a national banking association duly constituted and organized under and by virtue of the said *said* act of Congress and doing business in the city of Watertown in the said State of New York, interposed for a defense that the said defendant was and is prohibited by the said statute of the United States under which it was organized and constituted and doing business, from dealing in the kind of bonds or securities mentioned in the complaint in the said action and the sale of the said bonds mentioned in the said complaint to the plaintiff was without the authority or consent of the defendant and was not within the course of its regular business and was wholly unauthorized and was and is, void as against the provisions of said statute of the United States; and the decision of the said court of appeals and the said supreme court was that notwithstanding said prohibition of said statute, of the United States, and the provisions thereof the said defendant was liable to said plaintiff in such sale of said bonds; all of which will more fully appear by an inspection of the pleadings in the action and the opinion of the court of appeals of the State of New York, to which reference is hereby made.

Wherefore, in the record and proceedings in said suit manifest error hath happened to the great damage of said defendant The National Bank and Loan Company.

Wherefore, said defendant, The National Bank and Loan Company, by its attorneys aforesaid, prays for the allowance of a writ of error and such other process as may cause said error to be corrected in the Supreme Court of the United States.

PURCELL, WALKER & BURNS,
Att'ys for Petitioner,
15 *Washington St., Watertown, N. Y.*

d [Endorsed:] Supreme Court of the United States. The National Bank and Loan Company, pl'ff in error, *vs.* Moses Petrie, defendant in error. Copy. Petition for writ of error. Purcell, Walker & Burns, attorneys for pl'ff in error. Office and P. O. address, 15 Washington St., Watertown, N. Y. Read Aug. 16 1901 To Alton B. Parker Ch. J. Due personal service of the within admitted this —— — 189– —— ——, attorneys for ——.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable justices of the supreme court of the State of New York, in the fourth judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of of a plea which is in the said supreme court of the State of New York, before you, or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you, or some of you, the final decree or judgment of said court to be enforced in the suit between Moses Petrie, plaintiff, and The National Bank and Loan Company of Watertown, N. Y., defendant, wherein the said The National Bank and Loan Company, by its plea, answer or defense set up and interposed to the said plaintiff's complaint and cause of action a right, privilege, defense or immunity under and by virtue of an act of Congress of the United States, to wit, the act entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," passed June 3rd, 1864, and of the several acts supplemental thereto and amendatory thereof, and the decision of the said court of appeals and your said supreme court is against the right, privilege, defense or immunity so specially set up, interposed and claimed by said defendant, a manifest error hath happened, to the great damage of the said The National Bank and Loan Company, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 31st day of August, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-sixth.

[L. S.] W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York, in the Second Circuit.

PURCELL, WALKER & BURNS,
Attorneys for the Plaintiff in Error, 15 *Washington, St., Watertown, N. Y.*

Take notice: the foregoing is a copy of a writ of error granted in the above-entitled action, and filed in Jefferson county clerk's office this — day of September, 1901.

Yours &c., PURCELL, WALKER & BURNS,
Attorneys for Plaintiff in Error, Watertown, N. Y.

Due personal service upon me of a copy of the foregoing writ of error, at the city of Watertown, N. Y., is admitted this — day of September, 1901.

——— ———,
Attorney for Defendant in Error, Watertown, N. Y.

g [Endorsed:] Supreme Court of the United States. The National Bank and Loan Company, plaintiff in error vs. Moses Petrie, defendant in error. Copy Writ of error. Purcell, Walker & Burns, attorneys for pl'ff in error, office and P. O. address, 15 Washington St., Watertown, N. Y. Allowed Aug. 16, 1901 A. B. P. Ch. J. Due personal service of the within admitted this ——— — 189–. ——— ——— attorneys for —.

h UNITED STATES OF AMERICA, ss:

To Moses Petrie, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the Capitol in the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York, in and for the county of Jefferson, wherein The National Bank and Loan Company of Watertown, N. Y., is plaintiff in error and you are defendant in error, to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Alton B. Parker, chief judge of the court of appeals of the State of New York, this 16th day of August, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-sixth.

Allowed, Aug. 16, 1901.

ALTON B. PARKER,
Chief Judge of the Court of Appeals, New York State.

Due personal service upon me of a copy of the foregoing citation at the city of Watertown, N. Y., is admitted this — day of September, 1901.

——— ———,
Attorney for Plaintiff in Error, Watertown, N. Y.

i Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol in the city of Albany, on the 24th day of May, in the year of our Lord one thousand nine hundred and one, before the judges of said court.

Witness: The Hon. Alton B. Parker, chief judge presiding; W. H. Shankland, clerk.

Remittitur, May 25, 1901.

MOSES PETRIE, Respondent,
ag'st
NATIONAL BANK AND LOAN COMPANY, Appellant.

Be it remembered, that on the 6th day of February, in the year of our Lord one thousand nine hundred, National Bank and Loan Company, the appellant in this action, came here into the court of appeals, by Purcell, Walker, & Burns, its attorneys, and filed in the said court a notice of appeal and return thereto from the judgment and order of the appellate division of the supreme court in and for the fourth judicial department.

And Moses Petrie, the respondent in said action, afterwards appeared in said court of appeals by Brown, Carlisle & Hugo, his attorneys, which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals having heard this cause argued by Mr. John Lansing, of counsel for the appellant, and by Mr. Elon R. Brown, of counsel for the respondent, and after due deliberations had thereon, did order and adjudge that the judg-
j ment of the appellate division of the supreme court appealed from herein, be and the same hereby is affirmed, with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Wherefore, it is considered that the said judgment be, and the same hereby is affirmed with costs, as aforesaid. And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

(Signed) W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of N. Y.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *May 25th*, 1901.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] (Signed) W. H. SHANKLAND, *Clerk.*

k [Endorsed:] Supreme court Moses Petrie, resp'd't, *vs.* National Bank & Loan Company, app'l't. Copy Remittitur. Brown, Carlisle & Hugo, attorneys for respondent, 31–35 Savings Bank bldg., Watertown, N. Y. Due and personal service of — cop- of the within — admitted this — day of —— 190- —— —— attorney for —.

SIR: Take notice that the within is a copy of remittitur entered herein in the clerk's office of Jefferson county, on the 27 day of May 1901.

Yours, &c., BROWN, CARLISLE & HUGO,
Attorneys for Pl'ff, Resp., 31–35 *Savings Bank Bldg.*,
Watertown, N. Y.

To Purcell, Walker & Burns, attorney- for def't, app'l't.

l At a special term of the supreme court held at the courthouse in the city of Watertown, N. Y., on the 27th day of May, 1901.

Present: Hon. William S. Andrews, justice presiding.

In Supreme Court, Jefferson County.

MOSES PETRIE, Respondent,
vs.
THE NATIONAL BANK & LOAN COMPANY, Appellant.

The defendant above named, having appealed to the court of appeals from the judgment heretofore and on the 8th day of December, 1899, entered in the above-entitled action, affirming the judgment entered in said action on the 15th day of October 1898, and said court of appeals having heard the said appeal and having ordered and adjudged that said judgment so appealed from be affirmed, and judgment rendered for the plaintiff with costs,

Now upon filing the remittitur of the said court of appeals, and upon motion of Brown, Carlisle & Hugo, attorneys for said plaintiff, it is

Ordered, that said judgment of the court of appeals be and the same is hereby made the judgment of this court, and that the aforesaid judgment entered herein on the 15th day of October, 1898, be and the same is hereby affirmed, and that judgment of this court be entered herein affirming said judgment with costs of said appeal against the said defendant The National Bank & Loan Company, to be taxed.

Enter.

W. S. A., *J. S. C.*

Entered May 27th, 1901, at 3.25 p. m.

E. A. CHAPMAN, *Clerk.*

m [Endorsed:] Supreme court Moses Petrie *vs.* The National Bank and Loan Company Copy. Order making judgment of court of appeals judgment of supreme court Brown, Carlisle &

Hugo, attorneys for pl'ff-resp., 31–35 Savings Bank bldg., Watertown, N. Y. Due and personal service of — cop- of the within — admitted this — day of —— 190– —— —— attorney for —.

SIR: Take notice that the within is a copy of order entered herein in the clerk's office of Jefferson county, on the 27th day of May, 1901.

Yours, &c., BROWN, CARLISLE & HUGO,
Attorneys for Pl'ff, Resp., 31–35 *Savings Bank Bldg.*,
Watertown, N. Y.

To Purcell, Walker & Burns, attorney- for def't, app'l't.

In Supreme Court, Jefferson County.

MOSES PETRIE, Respondent,
vs.
THE NATIONAL BANK AND LOAN COMPANY, Appellant.

The defendant, The National Bank and Loan Company, having appealed to the court of appeals from a judgment heretofore and on the 8th day of December, 1899, entered in the above-entitled action, affirming a judgment entered in said action on the 15th day of October, 1898, and said court of appeals having heard the said appeal and order and adjudged that said judgment so appealed from be affirmed with costs, and the remittitur from said court of appeals having been duly filed in this court, and an order duly entered thereon, making the judgment of the court of appeals the judgment of this court, and directing judgment to be entered herein as hereinafter adjudged, with costs, and the plaintiff's costs and disbursements having been duly taxed by the clerk of the court at the sum of $112.01,

Now, on motion of Brown, Carlisle & Hugo, attorneys for plaintiff herein,

It is hereby ordered and adjudged that the judgment hereinbefore mentioned as entered herein on the 15th day of October, 1898, be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff, Moses Petrie, recover from and against the defendant, The National Bank and Loan Company, the sum of $112.01, the amount of his costs and disbursements herein as taxed, and that he have execution against the said defendant therefor,

Entered May 27th, 1901, at 3.25 p. m.

E. A. CHAPMAN, *Clerk.*

[Endorsed:] Supreme court. Moses Petrie, respondent, *vs.* The National Bank and Loan Company, appellant. Judgment of affirmance, court of appeals. Copy. Brown, Carlisle & Hugo, attorneys for respondent, 31–35 Savings Bank bldg., Watertown, N. Y. Due and personal service of — cop- of the within — admitted this — day of —— 190– —— —— attorney for —.

SIR: Take notice that the within is a copy of judgment entered herein in the clerk's office of Jefferson county, on the 27 day of May, 1901.

Yours, &c., BROWN, CARLISLE & HUGO,
Attorneys for Pl'ff, Resp., 31–35 *Savings Bank Bldg.*,
Watertown, N. Y.

To Purcell, Walker & Burns, attorney- for def't, app'l't.

p In Court of Appeals, State of New York.

MOSES PETRIE, Respondent,
vs.
NATIONAL BANK AND LOAN COMPANY, Appellant.

Appeal from a judgment of the appellate division of the supreme court in the fourth judicial department, entered December 8, 1899, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

John Lansing for appellant.
Elon R. Brown for respondent.

Judgment affirmed with costs; no opinion.
Concur: Parker, Ch. J., Gray, Bartlett, Haight, Martin, Vann and Werner, JJ.

q STATE OF NEW YORK:

In Court of Appeals.

MOSES PETRIE, Respondent,
against
NATIONAL BANK & LOAN COMPANY, Appellant.

Papers on Appeal.

Brown, Carlisle & Hugo, attorneys for respondent, Watertown, N. Y.
Purcell, Walker & Burns, attorneys for appellant, Watertown, N. Y.

r STATE OF NEW YORK:

In Supreme Court, Appellate Division, Fourth Department.

Supreme Court, Jefferson County.

MOSES PETRIE, Respondent,
vs.
NATIONAL BANK & LOAN COMPANY OF WATERTOWN, Appellant.

Statement under Rule 41.

This action was commenced on July 9, 1898, by service of summons on defendant.
The complaint was served August 9, 1898.
The answer was served August 10, 1898.

The names of the original parties are as above stated and there has been no change of parties.

PURCELL, WALKER & BURNS,
Attorneys for Appellant, 15 *Washington Street, Watertown, N. Y.*

1 STATE OF NEW YORK:

In Supreme Court, Appellate Division, Fourth Department, County of Jefferson.

MOSES PETRIE
against
THE NATIONAL BANK & LOAN COMPANY.

SIRS: Please take notice, that the defendant in the above-entitled action appeals to the appellate division of the supreme court, fourth department, from the judgment of the supreme court herein, entered in the clerk's office of the county of Jefferson, on the 15th day of October, 1898, in favor of the plaintiff and against the defendant for the sum of $784.31, damages and costs.

And said defendant also appeals from an order entered
2 herein in the Jefferson county clerk's office, on the 18th day of October, 1898, denying a motion made by the defendant to set aside said verdict and for a new trial upon the minutes of the court, and said appeal is taken from each and every part of said judgment and order.

Dated at Watertown, N. Y., this 14th day of November, 1898.

Yours, etc.,

PURCELL, WALKER & BURNS,
Attorneys for Defendant, App'l't, 15 *Washington Street, Watertown, N. Y.*

To Messrs. Brown, Carlisle & Hugo, plaintiff's attorneys, and to the clerk of Jefferson county.

STATE OF NEW YORK:

In Supreme Court, County of Jefferson.

MOSES PETRIE
against
THE NATIONAL BANK & LOAN COMPANY OF WATERTOWN.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclu-
3 sive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the county of Jefferson.
Dated this 9th day of July 1898.

BROWN, CARLISLE & HUGO,
Plaintiff's Attorneys.

Office and post-office address, 31–35 Savings Bank bldg., Watertown, N. Y.

In Supreme Court, Jefferson County.

MOSES PETRIE, Plaintiff,
against
THE NATIONAL BANK & LOAN COMPANY, Defendant. } Complaint.

The plaintiff for a complaint against the above-named defendant alleges that in the month of April or May, 1893, the plaintiff being unable to state the precise date, the said defendant sold and delivered to the plaintiff a certain Westchester County Water Works Company first consolidated mortgage six per cent. gold bond, No. 217, and conditioned for the payment of five hundred dollars ($500) on the first day of July, 1906, with interest payable at the said rate semi-annually on the first day of January and first day of
4 July of each year, it being a coupon bond. The said plaintiff paid for the said bond the full face value thereof and accrued interest in cash.

That the defendant is a national bank organized and doing business at Watertown, N. Y., under the national banking act of the United States, and at the time of selling the said bond to plaintiff, and as an inducement to making such sale, the said defendant through its officers, stated and represented to the plaintiff that the said bond was a first-class security, just as good as gold, and all right, and as a further inducement to the sale thereof, promised at any time that the plaintiff wanted the money thereon, to take the same back and pay the full face value thereof in cash to this plaintiff, and further stated to plaintiff that it had positive knowledge that the said bond was good, and that the property mortgaged to secure the said bond was ample security therefor, and for the issue of bonds of which the said bond was one. That the plaintiff then stated to the defendant in substance that he knew nothing as to the bond, and if he purchased it, he should do so relying wholly upon the defendant's representations; that thereupon the said defendant stated to plaintiff that he could come to the defendant's bank and collect the amount due upon the coupons on the said bond, and that the defendant would pay the same.

That the plaintiff thereafter presented at the defendant's bank the coupons falling due upon the said bond down to and including the first day of July, 1896, at about the time they fell due, and
5 the said bank in every case paid the said coupons to plaintiff, except on the said first day of July 1896, and the said bank refused to pay that coupon, and has refused to pay the coupons falling due since that time, and there has been no funds to pay the

same as plaintiff is informed and believes, at the Farmers' Loan and Trust Company in the city of New York, where the said coupons are made payable or elsewhere; the said Westchester County Water Works Company having been bankrupt for some time previous to the said first day of July, 1896, and nothing has been paid to the plaintiff on said bond since the said first day of January, 1896.

The plaintiff alleges upon information and belief that at the time he purchased the said bond of the said defendant, the same was secured by a second mortgage upon the property of the said water works company, whereas he was led to believe and did believe at the time he purchased the same, that it was a first mortgage, and the said second mortgage was subsequent to and subject to a prior mortgage covering the entire property of the said Westchester County Water Works Company, for a sum equal to or in excess of the entire value of said property, and the said second mortgage securing among others the bond so purchased by this plaintiff, was worthless and good for nothing for security; that the said Westchester County Water Works Company was and is of no financial responsibility.

That the statements made as aforesaid by the said defendant to this plaintiff as to the value of the said bond as a security, were false and fraudulent, neither the defendant nor its officers, nor any
6 of them, knowing that the bond was good, or that the security was ample, and the said bond not being a first-class security, not as good as gold, and not all right, and the plaintiff relied upon said statement in making the said purchase. That the said Westchester County Water Works Company in fact defaulted upon nearly all the coupons falling due after the purchase of the said bond by the plaintiff, but the defendant concealing that fact from the plaintiff, paid the same as they fell due as aforesaid down to and including the first day of January, 1896, and plaintiff did not know of or learn of the falsity of the defendant's statements until the latter part of the year 1897 or fore part of the year 1898.

That the defendant in selling the said bond to the plaintiff was not acting within the scope of its authority under the national banking act or the laws of the United States, but was acting in violation of those laws and unlawfully, and had purchased the said bond with others some time previous to the sale thereof to this plaintiff for the purpose of speculation. That prior to the commencement of this action, the plaintiff tendered the said bond to the said defendant, and demanded upon the delivery thereof, the payment of the face value thereof and the unpaid interest thereon up to date, which said demand was refused, and the tender declined. That the said bond was thereupon deposited at the office of Brown, Carlisle & Hugo in the city of Watertown, N. Y., in continuance of said tender, and notice thereof duly given to the said defendant and the tender of the said bond still continues good.

7 That the said bond is now of little or no value and the plaintiff has been damaged by reason of the matters aforesaid in the sum of five hundred dollars and interest thereon from the 1st day of January, 1896.

Wherefore, plaintiff demands judgment against the defendant for five hundred dollars and interest thereon from January 1st, 1896, besides the costs of this action.

BROWN, CARLISLE & HUGO,
Plaintiff's Attorneys, 31–35 *Savings Bank Bldg.*,
Watertown, N. Y.

JEFFERSON COUNTY, *ss:*

Moses Petrie, being duly sworn, says that he is the plaintiff named in the foregoing complaint; that the said complaint is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

MOSES PETRIE.

Sworn to before me this 8th day of August, 1898.
A. F. SHEFFNER, *J. P.*

8 Supreme Court, Jefferson County.

MOSES PETRIE
against
THE NATIONAL BANK & LOAN COMPANY OF WATERTOWN. } Answer.

I.

The defendant, answering the plaintiff's complaint herein, denies any knowledge or information sufficient to form a belief of the following allegations thereof:

That at the time of selling the bond mentioned in the said complaint, and as an inducement to making such sale, the defendant, through its officers, stated and represented to the plaintiff that the bond was a first-class security, just as good as gold and all right, and as a further inducemeut to the sale thereof, promised at any time the plaintiff wanted the money thereon, to take the same back and pay the full face value thereof in cash to the plaintiff, and further stated to plaintiff that it had positive knowledge that the said bond was good, and that the property mortgaged to secure the said bond was ample security therefor, and for the issue of bonds of which the said bond was one; that the plaintiff then stated to defendant in substance that he knew nothing as to the bond, and if he purchased it, he should do so relying wholly upon the defendant's representations; that thereupon the said defendant stated to plaintiff that he could come to the defendant bank and collect the
9 amount due on the coupons on said bond, and that the defendant would pay the same; that the defendant in every case paid the interest coupons on said bond as they became due down to July 1st, 1896; that there has been no funds to pay said coupons at the Farmers' Loan and Trust Company in the city of New York, where the said coupons are made payable, or elsewhere, the said Westchester County Water Works Company having been

bankrupt for some time previous to July 1st, 1896, and nothing has been paid to the plaintiff on said bond since the first day of January, 1896; that at the time of the purchase by the plaintiff of the bond mentioned in the complaint, he was led to believe and did believe that the same was secured by a first mortgage; that the second mortgage covering the entire property of the Westchester County Water Works Co. was for a sum equal to or in excess of the entire value of the mortgaged property; that the second mortgage securing, among others, the bond purchased by plaintiff, was worthless and good for nothing as security; that the said Westchester County Water Works Company was and is of no financial responsibility; that the statements made by the defendant to the plaintiff as to the value of the said bond as a security, at the time of the purchase thereof, were false and fraudulent, neither the defendant nor its officers, nor any of them knowing that the bond was good or that the security was ample, and the said bond not being a first-class security, not as good as gold and not all right, and the plaintiff relied upon said statements in making the purchase; that the defendant concealed from the plaintiff the fact that the West-
10 chester County Water Works Company defaulted upon nearly all of the coupons falling due at the time of the purchase of said bonds, and paid the said interest coupons on said bond as they fell due down to and including the first day of July, 1896, and that plaintiff did not know or learn of the falsity of the defendant's statements until the latter part of the year 1897 or the fore part of the year 1898; and that the said bond purchased by plaintiff is now of little or no value, and that the plaintiff has been damaged by reason of the matters stated in the complaint in the sum of $500 and interest thereon from the first day of January, 1896.

II.

For a second answer and defense, the defendant alleges, upon information and belief, that at the time of the sale of the bond to the plaintiff by the defendant, as alleged in the complaint, the said defendant, through its officers and agents, stated and represented to the plaintiff that the bank had purchased and become the owner of said bond after an investigation by the bank as to the value thereof; that it believed that the said bond was a first-class security and entirely good, and that the bank purchased the same upon the belief that the same was a good and valid security and would be paid at maturity, and that the interest coupons thereon would be paid as they matured; that the plaintiff might investigate for himself with reference thereto; that he did make such investigation, and thereafter purchased the said bond, paying therefor the face value thereof, with accrued interest thereon; that the sale of said bond to the plaintiff, and the entire business connected therewith, was
11 made and done by an officer or officers of the said defendant, without any resolution of, or authorization by, the board of directors of the said defendant.

III.

For a third answer and defense, the defendant alleges that at the several times mentioned in the complaint, the defendant was and still is a national banking association, by the name and style of "the National Bank and Loan Company of Watertown," duly constituted and organized under and by virtue of an act of the Congress of the United States of America, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, located and doing business in the city of Watertown, N.Y., and it has complied with all the provisions of the acts of the said Congress of the United States to enable it to extend its corporate existence, and its corporate existence has been duly extended; that by the said statute of the United States, under and by which the said corporation was organized and was and is carrying on business, it is prohibited from dealing in the kind of bonds or securities mentioned in the complaint, and the sale of said bond mentioned in the complaint to the plaintiff was without the authority or consent of the defendant, was not within the course of its regular business, was wholly unauthorized and was and is void.

Wherefore, defendant demands judgment, dismissing the plaintiff's complaint, with costs.

PURCELL, WALKER & BURNS,
Defendant's Attorneys,
15 *Washington Street, Watertown, N. Y.*

12 JEFFERSON COUNTY, } ss:
City of Watertown, }

George C. Sherman, being duly sworn, says he is the president of the defendant named in the foregoing answer; that said answer is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

GEORGE C. SHERMAN.

Sworn to before me this 10th day of August, 1898.

FREDERICK M. BOYER
Notary Public, Jef. Co.

Supreme Court, State of New York.

At a trial term of the supreme court, held at the court-house in the city of Watertown, Jefferson county, in and for the fifth judicial district of the State of New York, on the third day of October, 1898.

Present: Hon. F. H. Hiscock, justice presiding.

MOSES PETRIE *against* THE NATIONAL BANK & LOAN COMPANY.	Brown, Carlisle & Hugo. Oct. 12, 1898. Purcell, Walker & Burns.

Jurors.

Walter S. Martin, Amos Otis, C. J. Relyea, Thos. J. Phillips, George Ransom, Byron C. Carey, William Pool, Jr., C. R. Phelps, George Tapp, Frank Rogers, Clark Chadwick, Byron Walsworth.

13 *Witnesses.*

For plaintiff—Moses Petrie, Thomas Stratford, Frank W. Pierce, William L. Banks.

For defendant—Tom T. Waller, Fred Seymour, Edward J. Lewis, Charles L. Parmelee, George C. Sherman, Frank A. Hinds.

Evidence closed at 2.05 p. m. October 13, 1898.
Motion for nonsuit denied.

After the charge by the court at 5 o'clock p. m., October, 13, 1898, the jury retired in charge of officers Coon and Austin. Upon the coming in of the jury at 9.30 a. m., October 14, 1898, they say they find a verdict for the plaintiff in the sum of five hundred eighty-three dollars and fifty cents ($583.50).

FRANK D. PIERCE, *Clerk.*

(A copy.)

At a trial term of the supreme court held at the court-house in the city of Watertown, N. Y., commencing on the third day of October, 1898.

14 Present: Hon. Frank H. Hiscock, justice presiding.

MOSES PETRIE
against
THE NATIONAL BANK & LOAN COMPANY.

This action having been duly brought on for trial at this term of court before Hon. Frank H. Hiscock and a jury, and having been duly tried and submitted to the jury, and the jury on the 14th day of October, 1898, having returned a verdict in favor of the plaintiff and against the defendant for five hundred and eighty-three and $\frac{50}{100}$ dollars; and the defendant's counsel having on said day at said term duly made a motion upon the minutes of the court for a new trial upon exceptions, and to set aside the said verdict on the ground that the same is contrary to the evidence and contrary to the law; and the said motion having been entertained by the court, it was thereupon

Ordered, that the said motion for a new trial and to set aside said verdict be, and the same hereby is, denied.

And it is further ordered, that after entry of judgment herein, and

service of a copy of the same with notice of such entry, all proceedings on the part of the plaintiff be and hereby are stayed for thirty days from such entry and service, and that the defendant have sixty days in which to make and serve a case and exceptions.

Enter.

F. H. H.

15 In Supreme Court, Jefferson County.

MOSES PETRIE
against
THE NATIONAL BANK & LOAN COMPANY. } Entered Oct. 15, 1898, at 9.45 a. m.

The issues in this action having been tried at a trial term of this court held at the court-house in the city of Watertown, in and for the county of Jefferson, commencing on the third day of October, 1898, before Hon. Frank H. Hiscock and a jury, and the jury having rendered a verdict in favor of the plaintiff and against the defendant, The National Bank and Loan Company, for $583.50 on the 14th day of October, 1898, and the plaintiff's costs and disbursements having been taxed at the sum of $200.81.

Now, on motion of Brown, Carlisle & Hugo, attorneys for the plaintiff,

It is hereby ordered and adjudged by the court that the plaintiff recover of the said defendant, The National Bank and Loan Company, the sum of five hundred and eighty-three and fifty one-hundredths dollars ($583.50), found by said jury, together with the sum of two hundred and eighty-one one-hundredths dollars ($200.81), for plaintiff's costs and disbursements as taxed, amounting in all to the sum of seven hundred and eighty-four and thirty-one one-hundredths dollars ($784.31), and that the plaintiff have execution therefor.

W. W. KELLEY,
Deputy Clerk.

16 Supreme Court, Jefferson County.

MOSES PETRIE
against
THE NATIONAL BANK & LOAN COMPANY OF Watertown. } Case and Exceptions.

This case was brought to trial at the Jefferson trial term, on October 11, 1898, before Mr. Justice Hiscock and a jury. The plaintiff appeared by Messrs. Brown, Carlisle & Hugo, his attorneys, and the defendant by Messrs. Purcell, Walker & Burns, its attorneys, and John Lansing, of counsel. The following proceedings were had:

The plaintiff offered in evidence a bond, No. 217, of the Westchester County Water Works Company for $500, issued under a first consolidated mortgage upon the property of said company, bearing date January 1, 1890, and payable, the principal July 1, 1906, and the interest January 1 and July 1, at 6 per cent., and which pur-

ported to be a 6 per cent. gold bond for the amount aforesaid, which was received in evidence and marked Exhibit 1.

Also coupons attached to said bond excepting the coupon No. 20, payable July 1, 1896, which was received and marked Exhibit 2.

Also a first mortgage of the Westchester County Water Works Company upon its plant or property at White Plains, N. Y., to the Farmers' Loan and Trust Company, as trustee, to secure the payment of $100,000 of first-mortgage bonds, recorded in the
17 office of the register of Westchester county in Liber 847 of Mortgages, page 431. This mortgage is dated July 1, 1886, was made by the said Westchester County Water Works Company, a corporation organized under the laws of New York, having its principal place of business at Watertown, N. Y., to the said Farmers' Loan and Trust Company, a corporation organized under the laws of said State, and covers all the property of the said water works company at White Plains, N. Y., that it had at the time the mortgage was made.

Mortgage received and marked Exhibit 3.

Also another mortgage made by the said Westchester County Water Works Company to the said Farmers' Loan and Trust Company, bearing date January 1, 1890, and recorded in the register's office of Westchester county on March 31, 1890, in Book 947 of Mortgages at page 30; said mortgage was received and marked Exhibit 4 and is a first consolidated mortgage covering the same property as said first mortgage, Exhibit 3, and such additional property as the said mortgagor had acquired by extensions or otherwise of its said property, and provided for the issue of bonds to the amount of $200,000, with interest-bearing coupons payable semi-annually in gold, at the office of said trustee, and for the payment of which bonds and interest the said mortgage was a security; and it also provided that $100,000 of said bonds should be held by the said trustee and used in retiring at maturity the $100,000 of bonds issued under said first mortgage; that $15,000 of said bonds should be delivered by said trustee to the said water company, and the
18 balance, or $85,000, thereof should be retained by said trustee in trust for said water company and delivered to the said water company upon the order of its board of trustees the proceeds thereof to be used "only for the purpose of adjusting and paying just debts now or hereafter owing by the said company, and for the purpose of making extensions and improvements to the water works belonging to said company in the village of White Plains, N. Y."

Moses Petrie, the plaintiff, sworn as a witness in his own behalf, testified:

I am the plaintiff; am a farmer, residing in the town of Pamelia; have resided there twenty-one years; am 50 years old; I knew George H. Sherman. I remember in 1893 going into the National Bank and Loan Company in this city and having a talk with him.

It was here conceded that Mr. George H. Sherman died in February, 1897; that he was president of the defendant, owning about one-half of its capital stock.

Q. (To witness.) What was that talk?

Defendant objected to any conversation between the witness and Mr. George H. Sherman as incompetent under section 829 of the Code.

Objection overruled and defendant excepted.

Witness continuing: I had a talk with Mr. Sherman in April, 1893, in the back room of the bank; no one else present.

Q. Go on and state it.

19 Objected to by defendant as incompetent, being a declaration on the part of an officer of the corporation and not the business of the bank.

Objection overruled and defendant excepted.

This talk was in the bank president's room; I went in and said, "Good morning, Mr. Sherman, I have got a little money that I thought I would invest in something if I could get the interest on it for a few years; by and by I would want the principal." He said, "I have got some bonds here I am about getting—;" he either had or was going to send his man off down here to White Plains to look it up and see as regards the value of the security of them really, what there was back of them; we had a little talk; I can't tell the sum or substance of it more than I left the money with him; he said, "Come in the next time you are out, by that time we will know all about it, I can tell you then." I left $500 with him at that time. The next time I came to the city, two or three weeks after that, I went in; I saw Mr. Sherman, had a little talk about the matter; I can't tell just how it came, word for word, but at any rate, "My man has been down there and looked it up and found these bonds are all right, first-class securities and just as good as gold." Well, he got this bond out and handed it to me, or read a little of it himself. I said, "Mr. Sherman, I don't know anything about those bonds; I am a farmer; if I take this bond I have got to rely on your judgment;" after reading along he came to the bond running fourteen years before it became due. I said, "Mr. Sherman,

20 I guess I don't want to have anything to do with that; I shall want my money; I don't want to be without this money fourteen years, I may want to use it, it is only for a few years anyways I should want to leave it." Well, I got up, thought I would get my money and go along; he kind of followed me along and said, "Petrie, you don't think for a minute I would put these bonds on this market without I knew they were first-class security and just as good as gold." "Well, it has to run a long time, I don't believe I want it, the time is too long; it don't come due until 1906." He says, "You bring the bond in here if you should want the money before it comes due; bring that bond here and I will give you the money on it." I said, "If you will do that, why, of course, I will leave the money and take the bond," and he figured up the interest which was running from January until the last of April or the first of May; I paid him for the full value, as I supposed, of the bond; what he said the bond called for at that time.

There was something said at that time about the coupons. He said, "You can come in here and get your interest on these coupons as they become due." I left the bond with Mr. Sherman; I left it at that time and mostly all the time; I might have taken it home once, but I don't hardly think it. I got my pay on the coupons as they became due to and including January, 1896. They paid all the coupons which I haven't got. It seems to me Mr. Sherman told me they had got into a litigation over the water works and they were using their money as it came in, but they were all right; he said yes, it would turn out all right. I can't tell right then whether he said, "Now, don't be alarmed about this, it is going to be all right; you put your money in here and you shall have it."

21 That is nearly the last talk I had with Mr. Sherman. I got my interest on the coupons about the time they became due till the time stated; no officer of the bank said anything to me when any of these coupons were paid about the money not being paid by the Westchester County Water Works Company, or the bank's having to advance the money; I learned here today that the defendant advanced the money on the coupons. I relied upon these statements that George Sherman made to me in relation to this bond in purchasing it. I believed them to be true at the time they were made.

Cross-examination:

I believed what Mr. Sherman said to me; I had known him ten years; had been to the bank and had cheese checks cashed. He owned some land near where I live; often talked with him about it; once when he drove out to his farm he stopped to see me. I didn't keep a regular deposit in the bank. I knew Mr. Sherman in this community; he is dead now; I regarded him as an upright man; never heard anything to the contrary; I believed what he said to me implicitly, when he said this was a good security; I knew he was a banker. The first time I called on him he said he thought he could find me a good security, and told me he was negotiating for some securities; I didn't ask him where they were; he told me they were in White Plains, a suburb of the city of New York; told me that it would be a security based upon the water-works supply of the village; said he learned of these bonds and was negotiating for some of them; that the bonds were to be secured by mortgage on the plant; I don't think he told me that he had talked with

22 the people who lived or had been at White Plains relative to the value of the property; he didn't tell me that he had already sold some of the bonds; didn't tell me so at any time; I didn't inquire whether he had or not. At our first interview he said he was going to send a man to White Plains and investigate relative to the value of this property; it was about two or three weeks before I called again; then I had a talk with him; he said he had sent his man, Mr. Parmelee, down there to investigate the property; I am sure he told me that it was Mr. Parmelee. I knew Mr. Parmelee by sight; he was cashier of the bank. After he told me he had sent Mr. Parmelee I didn't talk with Mr. Parmelee. I never asked him if he had been down there, nor what he had found about the bonds, before

I bought; I didn't have anything to do with Parmelee; did the whole business with Sherman. Mr. Parmelee has cashed checks for me, but the entire transaction about the bonds from the beginning to the end was with Mr. Sherman in the back room of the bank; so far as I know Mr. Parmelee did not have any knowledge that I bought a bond; I closed it with Mr. Sherman; gave him the cash in the back room; the bond was not paid for by a check; I didn't draw a check for the cash; in none of the transactions that I had with Mr. Sherman was there any one else present. Between the first talk I had with Mr. Sherman and the purchase of the bond I didn't talk with any other person relative to the bond unless it was my wife; I don't remember that I ever bought any securities before; never took any mortgages but a chattle mortgage, one that has been renewed a good many times; there was a mortgage on my farm of $2,223 once
23 that I paid up and took an assignment of; in 1886 I took a mortgage of W. H. Petrie; I have loaned money on promissory notes. Mr. Sherman told me that that bond was as good as gold; he didn't say that he had been to White Plains at that time; said that he hadn't sent his man; I didn't suppose that he had then been to White Plains; he didn't say he had; I didn't suppose he had been there personally to investigate at all; he sent his man; I knew at the time he told me that the bond was as good as gold, that he based his statement upon what his man told him, he said he did; he did not say he based his statement upon information he had received relative to the value of these works; I didn't ask him what he based his statement upon; he told me without asking; he told me that he sent his man down there and looked it up; I supposed that was all the information he had upon the subject at the time I bought this bond; I purchased the bond in the spring of 1893; should think the first talk was in April and the purchase was about May 1st. Before Mr. Sherman died I called upon him with reference to this bond but won't say I asked him to pay the money on it; after his death I didn't call on his wife; I knew he left a widow and no children; I called at the bank and was directed to see the young man, George C. Sherman, and went do see him; he was the only person I called upon; I didn't understand he was an officer of the bank; I didn't ask him to pay me the money on that bond. The first time I called upon Mr. Sherman in the bank I left the $500 with him.

Q. You mean by that that you made a deposit in the bank, don't you?

24 A. No, Mr. Sherman took the money in the back room.

Q. Did you have a bank book?

A. No, sir.

I did not tell him I wanted credit at the bank for it; I left it there for safe keeping; gave it to him for safe keeping while I was in the back room; that is the only thing I ever had to do with the money afterwards; when I got the bond the interest on it had accumulated from January until April or May and I gave him that; for the bond I paid $500 and somewhere about $11 or $12; the $11 or $12 was what I paid at the time I got the bond; I paid that to Mr. Sherman in cash; that was all the money transaction I had

with him at the time I got the bond; I went to the bank after that to get my interest on the bond; I didn't go to the bank and do any other business relative to this bond after I got it in April, either to pay anything for it to do any other business with the bank excepting to get the interest on the coupons. Mr. Sherman told me that he wouldn't let any security go out of his bank or onto the market that he didn't know was good; he used the word "know," I remember that distinctly; I can't tell what answer I made; he made this statement, that he didn't put anything on the market but what he knew was all right. In all the time he was doing business here I didn't know of his doing anything of the kind.

Redirect:

When I talked with George C. Sherman, the young man, I had not learned that this bond was a second-mortgage bond; the
25 mortgage that was on my farm that I took an assignment of was running for fifteen years when the owners wanted the money; I got it by giving another mortgage and paid up the first mortgage and took an assignment of it and owned the farm and had the mortgage against it; the W. H. Petrie mortgage was for $200 or $300; I helped him with some money and he didn't pay it and things looked a little bad and he gave me a mortgage on his share in the 50-acre lot piece. The chattle mortgage I took of Salisbury; he was being crowded on a mortgage and persuaded me to help him out for about $60; I borrowed $30 of it, paid up the mortgage and took a new one; there were two of them, come to think; one of $60 and one of $125; the $125 one is paid; the $60 one is hanging along now; it is probably five years old.

Plaintiff offered in evidence a written demand upon the bank; received and marked Exhibit 5.

EXHIBIT 5.

WATERTOWN, N. Y., *July 9th*, 1898.

To the National Bank and Loan Co., city.

GENTLEMEN: The undersigned hereby tenders to you the Westchester County Water Works Co. bond, No. 217, and demands payment of the amount thereof, to wit: five hundred ($500) dollars and interest thereon from the first day of January, 1896; said bond to be delivered upon payment of the amount demanded. In case said tender is not accepted and payment made, the same will be kept in tender on the same conditions at the law office of Brown, Carlisle & Hugo, Watertown, N. Y., and will be delivered at any time on payment of the amount demanded.

MOSES PETRIE.

26 I had a conversation with Mr. Sherman, shortly before he went to New York or Florida, in the back room of the bank in relation to the bond; that was the fall before he died; he was just about to make a trip South.

Q. What was the talk which you then had with Mr. Sherman about this bond?

Objected to by defendant as improper, irrelevant, incompetent and immaterial.

The COURT: You had given enough so that I will allow them to give that talk; it may possibly be incompetent, but I will allow them to give it as it stands now.

Defendant excepted.

A. I spoke to him about the interest on the bond not coming; he said, "They have got into a litigation over these water works; they are using the rent we might call it—the money—it is going to turn out all right; don't have any trouble about this, put your money in here, you shall have it out."

I said, "It don't look right." He says, "Well, now it is all right, you just hold on, you will have your money."

Recross:

That talk was in September, 1896; I hadn't then had my July interest; had had all but that; that is the last time I saw Mr. Sherman; no person was present at that conversation; I don't remember
27 that I ever purchased any other kind of bonds, nor held other bonds for other parties; have not owned any bonds other than this one; I didn't buy a Davis sewing-machine bond that I recollect of; never bought and owned a town of Diana bond or any other bond which I can recollect. My memory is fair as usual, I should think. I think it is good in reference to the talks I had with Mr. Sherman; this forenoon I had forgotten about the mortgage; I do not know where I got the money that I first handed to Mr. Sherman; I do not know just how much it was, think it was $500; it was not a bond that I gave to Mr. Sherman instead of money; didn't give him a bond which with accrued interest amounted to $515; I can't tell you where I got the cash I left with him; I didn't have any without it was my haying, something like that, and got the money on it; I couldn't tell you where I got the money, whether it was money I had saved along and had about $500 or whether I got it all in a lump; I should think it was money I saved and it got up to $500; I didn't usually keep much money in my house, but I don't remember where I got this; I know I didn't sell any security to get that money; I know I didn't give Mr. Sherman a bond and mortgage or other security to amount to that sum; I gave him the money; I didn't draw anything out of the bank the day I first handed him the money; I don't think I ever drew any checks on the bank; a Mr. Low once owed me $150 and paid me; I can't tell when it was; can't tell whether it was a part of the money which I put into Mr. Sherman's hands; can't tell when I lent this money to Low; I had his note.

Plaintiff offered in evidence a certificate of the Farmers'
28 Loan and Trust Company showing as to the moneys that were paid into it which were applicable to the payment of

coupons attached to the second mortgage of the Westchester County Water Works Company.

Objected to by defendant, not because the certificate is not the best evidence, but on the ground that it is incompetent, immaterial and irrelevant.

Objection overruled and defendant excepted.

Certificate received and marked Exhibit 6.

This exhibit need not be printed.

Plaintiff also offered in evidence a letter from the attorneys of the Farmers' Loan and Trust Company, showing a summary of Exhibit 6 above, which it was agreed might be received in connection with said certificate Exhibit 6, subject to the same objection, ruling and exception as to Exhibit 6, which letter was received and marked Exhibit 7, the material part of which is as follows: "In this connection we may say that the Farmers' Loan and Trust Company received funds from the Westchester County Water Works Company and from the treasurer of the village of White Plains sufficient to pay interest on the first consolidated mortgage up to and including January 4, 1894; after that time partial payments of interest were made the deficiency being made up in scrip of the water works company. These payments were made as follows:

"July 1, 1894, 2 per cent. per annum on all outstanding first consolidated bonds; balance in scrip.

"January 1, 1895, four per cent. per annum, balance in scrip.

29 "July 1, 1895, 5 per cent. per annum, balance in scrip.

"January 1, 1896, 5 per cent. per annum, balance in scrip.

"July 1, 1896, a part of the outstanding first consolidated coupons were paid in full and the rest were not paid.

"Since that time no interest has been paid and no funds have been furnished the trust company with which to pay interest."

FRANK W. PIERCE, sworn for plaintiff, testified:

I reside at White Plains, Westchester county, and have for about eleven years; before that resided in Rutland, Jefferson county. At White Plains I have been in the plumbing and steam business. The original system of the Westchester Water Works Company was constructed in 1886; I commenced working for the company June, 1887, and worked until January 7, 1891. I had charge of all extensions under the superintendent of the works, had charge of the actual construction of the extensions up to 1891. I continued to reside there ever since and have been engaged in making connections all the time with houses to the extensions as made; I have examined the water-works so as to know what there is of them; made a critical examination commencing along last spring and finished up when the commission was about to close the case this fall; I did this at the request of counsel for the water commissioners for the purpose of qualifying myself as to the actual cost of the sys-

30 tem; I have constructed water works myself; constructed a plant for the Scarsdale Water Co. about four miles down the Bronx river from White Plains. I had charge of the construction of about $30,000 worth of the Westchester County Water Works

Company plant; have been engaged in the sale of the material used; have sold a great deal of pipe; have been sales agent for the Utica pipe works for a great number of years in that section of New York; sell a great deal of pipe of all sizes; sell in lots of 50, to 75 and 100 tons; not exactly for the construction of water works, most of it was for sewer works, but the same material which is used in water works. The original plant of the Westchester Co. Water Works Co. consisted of one well, 65 hydrants, five miles of water mains consisting of 12-inch, 8-inch, 10-inch, 6-inch and 4-inch pipe running through five miles of village streets; that was the original work done in 1886. Then we started in as the village grew laying laterals in the small streets that had hydrants once in 400 or 500 feet of the pipe line. About 1889 the company built a second well and in 1894 still another well; they have three wells in all. About April or May, 1893, they made an addition to the five miles of water mains of about six and a half miles of water mains, including a matter of about 40 to 50 hydrants. There were two wells built prior to 1893 and there was at that time about 11½ miles of pipe. There was about three-quarters of a mile of 12-inch pipe; half or three-quarters of a mile of ten-inch pipe, three-quarters of a mile of 8-inch pipe, about three miles of 6-inch pipe, and the balance of 4-inch pipe. So far as the pumping apparatus is con-
31 cerned that is just the same today as it was in the fall of 1886; it has always remained the same with the exception of the compounding of the first big pump, which was done in 1892 to make it better; the system is the same; it is the stand-pipe and gravity system; the water is pumped from the wells into the stand pipe and then by gravity the town is supplied; after 1893 well No. 3 was built; a big well and very short pieces of water pipe laid; most of the pipe which was there in the system was there before 1893; I should think of about 12½ miles in the whole system 11½ was in in 1893; the first well is 17 feet in diameter and 23 feet deep; in the bottom is a 10 or 12 inch pipe. Well No. 2 is 30 feet in diameter and 24 feet deep, which has a brick curbing from the bottom clear to the top. Well No. 3 is 30 feet in diameter, 24 feet deep; that is the best well; it is in the lower part of the swamp. I can state what it cost to construct these water works as they stood in 1893. My estimate comes down to the last well in 1896; they have not made any improvements since then. I can deduct from the cost the improvements which I have described made after 1893.

Defendant objected to this evidence as improper, incompetent and immaterial, no foundation having been laid for it.

The COURT:

Q. What do you mean by "no foundation laid for the evidence"?

DEFENDANT'S COUNSEL: It is in no way connected with the
32 subject-matter of the action, to wit: the allegation that Mr. Sherman knowingly and intentionally deceived the plaintiff at the time of the sale of the bond.

The COURT: I will overrule the objection and give you an exception.

WITNESS: The cost of the whole system up to 1896, when they really stopped all work, was $84,448.

DEFENDANT'S COUNSEL: I assume the witness is giving his opinion.

The COURT: I am assuming he is giving his knowledge; that is what the question calls for.

WITNESS: I give my answer from the knowledge of the price of labor and all material which went into that entire system. I didn't construct the whole of that work; only built the extensions; I knew the value of the excavation made. I have dug in every street in White Plains or had it done. I knew what the cost of pipe was. I carefully computed from knowledge which I possess the cost of this work, including what I did and what others did.

Q. What was the fair value of this plant which you have described in 1896?

Objected to by defendant as improper, incompetent and immaterial, no foundation laid for it.

The COURT: The first objection you made before, that it is immaterial and improper; the latter one goes to his competency. I should think *prima facie* he is qualified. You may cross-examine if you desire.

33 Objection overruled and defendant excepted.

A. $84,448 in 1896, exclusive of the real estate; that does not include the real estate nor meters; part of the meters were the company's property; I give no estimate as to them.

Q. What do you say the fair value was in the spring of 1893?

Objected to by defendant, same as before.

Objection overruled; exception.

A. About $6,000 less than the price given. I made no examination as to the meters.

Cross-examination:

When I first went to White Plains I worked for the Westchester County Water Works Company.

To the COURT:

There was no material change in the condition of the plant between 1893 and 1896, except the additions made to it and the building of the new big well; there was no change in the quality or condition of the plant, except as they added to it.

To Mr. PURCELL:

I went down there to work for the company and worked from the 22nd of June, 1887, to January 7, 1891; after that I worked for myself; I did work for the village at some time in this case. I qualified myself to become a witness for the village against the company.

After I got through working for the company, I opened a store in about January, 1891, and continued the store until last Feb-
34 ruary. From 1891 until last February I did not do any work on the construction of the water plant. I made house connections but not for the company; made these connections when called on by the consumer, not by the village or company. All the information I derived relative to the value of this property from January, 1891 to February, 1898, was in my business as a plumber; that business was simply making connections with residences and the water mains.

I undertook to qualify myself as an expert witness for the village in the fore part of June, 1898. I was hired by H. T. Dykeman, counselor for the water commissioners, who were trying to take the water plant away from the company for the village of White Plains. I was paid $500 for what I did—for my examination and testifying. I should think I worked about thirty days in making the examination, and testified five days. I was a witness to testify relative to the cost of the plant; was a witness for the commissioners. I think all who testified, testified very close to me; there was but little difference; I did not hear Mr. Frank Hinds, of Watertown, testify. In the thirty days' work I did in examining the system, I looked at everything in it. All the machinery was in sight, stand pipe, hydrant and pipe system all over the village. In my estimate I included the pumping station, tower and the three wells. Did not include the land. I think there was about twenty-two or twenty-three acres with the wells that I did not include, nor did I include the actual water supply in my estimate. I do not understand that the actual water supply was discovered by the com-
35 pany. It had been there for all time; they bought the land and located it. I do not think anybody could have helped but know there was water there, the land was pretty near under water. I know it was a supply of water that was brought from the earth underneath a body of water; the water was on top of the ground; nobody knew there was a good supply of water underneath the body of water until this company took hold of it. This supply of water comes from under the bed of a pond or swamp of water in White Plains, and from the top as well. They have got the three wells continuously pumping for about eleven or twelve years before getting any good dry land; there was a regular swamp-hole there. I know this company prospected there and I think the supply was discovered by the company by boring into the earth commencing at the foot of this pond or swamp; that was known as a great water-hole always; I know this only from what people say about it. It was a water-hole when I first went there. I went there in 1887. Moffett, Hodgkins & Clarke located the water supply in the spring of 1886, before I went there at all. They took me down there to work for them. In my estimate of the value of the plant, I did not include either the land or water supply. It has turned out that the water supply is a fair one. It has, up to the present time, furnished all the water that is required for the uses of the inhabitants of the village and the water is elegant; the supply is considered

quite valuable. White Plains is 23 miles from the Grand Central depot in New York city. New York city has gone out forty miles above us for water. It has not touched this supply. In my
36 estimate I did not include anything for the franchise given by the village of White Plains to the water works company; for neither the land, the water supply nor franchise, I did not put in one cent in making my estimate; I don't know definitely the earnings of the water company. Scarsdale is four miles down the Bronx river; it is not much of a village; that is where I put in a system. I connected with a large well and a tower eighty feet high; a large tank on top. I put in the whole system; have forgotten the cost, about $5,000 or $6,000; not a very large job; I had the contract myself; I think there was about two miles of pipe laid. I did not pay anything for the supply. It was on their own land. I furnished the pipe. Did not furnish the stand pipe. It is a wooden tower, with a 16,000-gallon tank on top. I furnished some hydrants; they did not use many; I think about half a dozen. The largest pipe used is four-inch; for this pipe and half a dozen hydrants I put in, it cost, I think, from $4,000 to $5,000. The greater portion of the pipe I put in is two-inch pipe and none larger than four inches.

To the COURT:

The estimate or valuation I have given is based largely on my estimate of what it would cost to put in that plant at the time it was done, giving the price of each ton of pipe at a varying price from year to year. I put the value as of the different times when the different parts of the plant were put in from the time the work begun until 1896. Those values were a good deal larger at the time they were put in than they were in 1893; so in making my estimate of value, I gave a greater allowance for costs than would be the case at that time.

37 To Mr. PURCELL:

I commenced buying cast-iron pipe in 1896 from the Highland Park Association at Henderson for a little water works out there at Rutland; that was three-inch pipe; I commenced to buy six or twelve inch pipe in 1889 or 1890. The pipe I bought I sold to the village of White Plains and to Mr. Freeman Merritt; it was put down in the street for sewers. This was water pipe; 200-foot pressure pipe; it is a fact that all materials connected with the construction of a water plant was very much higher in 1886, 1887 and 1888 than it is now, and considerably higher than it was in 1893, and in 1893 considerably higher than it is today. White Plains has a population of about eight thousand; it has added about five thousand to the population within the last ten years; that is since the water works were put in; the value of real estate at White Plains has advanced.

Redirect:

I stated to the court that in making my estimate I took current price at the time the pipe was put in, but it was not the current prices in 1893 or 1896, but the different years.

THOMAS STRATFORD, sworn for plaintiff, testified:

I reside in Brooklyn, N. Y.; am a civil engineer and have been for thirty-three years; have been connected with the construction of water works; I was connected with the construction of part and maintenance of part of the water works of the city of New York, the city of Brooklyn, the entire con-
38 struction of the water works of Prospect Park, Brooklyn, a part of the system at Fort Hamilton, and the Government reservation, and part of the system at the navy yard at Brooklyn; and for the last three years I have done some work as a contractor in the construction of plants themselves. I examined the water works at White Plains owned by the Westchester County Water Works Company, and am acquainted with those works; examined them a year ago, commencing in September and finished in January, 1898. For the purpose of examining them, I dug test-holes and test-pits, about one hundred altogether, at the request of the president of the board of water commissioners of the village of White Plains, and counsel for water commissioners, Mr. Henry C. Dykeman; I did this in order to be able to act as an expert witness in condemnation proceedings taken by the village of White Plains to take the plant. I knew the cost of work of that character from 1886 down to 1893.

Q. What was the value of these works in 1893, before the third well was dug and about a mile and a half of the small pipe and extension had been laid?

Objected to by defendant as immaterial, improper and irrelevant; no foundation for the evidence.

Objection overruled, and defendant excepted.

A. It was worth about $68,000 in 1893.

That would be the value in my judgment. The water supply there is water extracted from a bed of sand and gravel by means of intercepting wells sunk in the sand and gravel; the water
39 being removed from the wells by means of pumps. The watershed is a trifle over one square mile—708 acres. I know what the water supply is from that watershed; a safe supply to be depended upon, 300,000 gallons a day. That is a supply of 60 gallons *per capita* for five thousand people. There is a way of increasing the supply from the watershed; it can be increased maybe 150,000 gallons a day by lowering the pump, so that about six feet more of water can be drawn out of well No. 3 than is now drawn, owing to the position of the pumps; that is to say, the height of the plane of the pump cylinder is too far from the bottom of well No. 3 in order to use No. 3 to the greatest advantage; if the pump were lowered five feet, five feet more water could be taken out; I think it could not be increased more than 150,000 gallons. In putting it at 450,000 gallons daily, I fix that as a safe maximum limit of the supply of Tompkins valley, which is a valley in which this company's property lies; that would be a safe water supply for half as much more, 7,500 people.

By Mr. BROWN: By consent I will read in evidence a clause from

the contract between the Westchester County Water Works Company and the village of White Plains, in the construction of these water works.

By Mr. PURCELL: Yes, but I object to the evidence as improper, incompetent and immaterial for any purpose in the case.

Upon the concession that the contract and clause in question were in existence and force in the spring of 1893, the court overruled defendant's objection, to which an exception was taken. The clause of the contract referred to was read and is as follows:

"The party of the second part reserves the right at the expiration of five years from the date of the completion of the works and at the expiration of every five years thereafter, to purchase said works as they may then exist, by giving to said company one year's notice of such intention and paying to said company the appraised valuation. The amount so to be paid to be determined by three persons not in the interest or employ of said village or company, the board of trustees of said village choosing one, the company choosing one, and these two persons choosing a third.

"Such valuation by the said appraisers in no case to exceed the cost of said works more than 10 per cent. And the decision and appraisal of these three persons to be final and conclusive on the parties to this contract."

By Mr. BROWN: I offer in evidence copy of the franchise under which the company commenced operations.

Objected to by defendant's counsel, same as before, but not that it was not the franchise.

Objection overruled, and defendant excepted.

The seventh clause of the franchise was read in evidence.

Franchise of Westchester County Water Works Co., in White Plains.

Resolved, That permission be given to Messrs. John F. Moffett, Frank A. Hinds, Henry C. Hodgkins, John V. Clarke, George B. Bassett, Frank Walts and Clarence A. House, and they are hereby authorized to form a water works company for the purpose of supplying the village of White Plains with pure and wholesome water, pursuant to "An act in relation to the creation of water works companies in towns and villages of the State of New York," passed June 12, 1873, and acts amendatory thereof and supplemental thereto, upon the following conditions:

First. The company shall organize within two weeks from the date of this grant, and shall complete their works and be prepared to deliver water at all the hydrants named below, by the first day of October, 1886.

Second. Before entering upon any street for the purpose of laying water pipes or erecting hydrants, the company shall satisfy the board of trustees of the village of White Plains as to the quality of the

water which they propose to introduce, and of their ability to furnish a minimum supply of 250,000 gallons daily.

Third. The conduit pipes to point of the beginning of distribution shall not be less than 12 inches in diameter in the clear, the mains in all the principal streets not less than eight inches, in all the other streets indicated by colored lines on water committee's map
42 of distribution not less than six inches and no main shall be less than four inches—all mains and conduits to be of best quality cast-iron pipe of the thickness given by the Warren Foundry and Machine Company's list, to resist a pressure of 250 feet head.

Fourth. The distribution shall include all the streets or parts of streets indicated by colored lines on water committee's map, and there shall be not less than five miles of distribution pipe in all; and the water company shall furnish the village of White Plains with water by means of 65 double hydrants at such points along the lines of distribution as the board of trustees may direct, for the use of which the rental shall not exceed the sum of $2,500 per annum, and any additional hydrants required shall be furnished *pro rata*. This rate shall not be increased at any time.

Fifth. Before entering upon any streets for the purpose of laying pipes or erecting hydrants, the water company shall give to the village of White Plains a bond in the penalty of $20,000, with good and sufficient sureties, conditioned for the payment of any damages and costs that may be recovered against the village for injury to person or property resulting from or caused by reason of such construction of water works or pipe-laying, or disturbing the streets or sidewalks in said village.

Sixth. The water company shall so construct their works as to furnish, at all times, a flow of water in the second story of any house now built or that may be built within the village limits from Broadway westerly, and so that in descending from the highest
43 point, there shall be a steady increase of head equal at any point to fifteen feet plus ninety per cent. of the number of feet that such point may be below the level of the highest point.

Seventh. The village shall have, at the end of five years, and at the end of every five years thereafter, the right to purchase said water works in the manner as now provided for by law.

Eighth. The water rates to parties other than the village authorities shall not exceed the rates adopted by the city council of Streator, Ill., May 11, 1885.

Ninth. The company shall give preference to resident mechanics, teamsters and laborers at the prevailing rates of pay, and shall not employ cheap Italian, Hungarian and other imported labor.

The name "Clarence A. House" and the words "two weeks" were written before signature, also the name "Thomas Moore" and the words "one month" were erased before signature.

JOHN BIRCH,
Clerk of the Village of White Plains.

Richard Dowdall voted aye, John H. McArdle voted aye, Mark Lyons voted aye, Edward B. Long voted aye, Charles H. Tibbits

voted aye, James D. Wright voted aye, Lewis C. Platt, supervisor of the town of White Plains, voted aye.

Of all of which please take notice.

Dated, White Plains, N. Y., May 28th, 1886.

(Signed) L. C. PLATT,
Supervisor of the Town of White Plains.

44 H. T. DYKMAN,
President of the Village of White Plains.
JOHN H. McARDLE,
Trustee of Village of White Plains.
MARK LYON,
Trustee of Village of White Plains.
JAMES D. WRIGHT,
Trustee of Village of White Plains.
E. B. LONG,
Trustee of Village of White Plains.
CHARLES H. TIBBITS,
Trustee of Village of White Plains.
RICHARD DOWDALL,
Trustee of Village of White Plains.

Witness continued: I know the kind of pipes that are in this system; cast-iron pipe will depreciate by use at the rate of ten per cent. in each decade. The depreciation is greater in four than in the twelve-inch pipe in the direct proportion of the area; a four-inch pipe will close up more rapidly than a twelve. I think it would be more than ten per cent. in a four-inch pipe in ten years; might be as high as fifteen per cent. in four and six-inch pipe. The pipe here consisted of a little less than 4,300 feet of 12-inch pipe, about 7,000 to 8,000 feet of 10-inch pipe; between 10,000 and 11,000 feet
45 of 8-inch pipe; some 23,000 or 24,000 feet of 6-inch pipe and 31,000 feet of 4-inch pipe; that includes all the cast-iron pipe down to 1896. There was about three miles of smaller galvanized-iron pipe in the system of from three inches to one-half inch. As to the four-inch pipe, it has no use whatever. It never should be put into any pipe system. It is barred by all engineers. I said there was about six miles of four-inch pipe. There are hydrants on the four-inch pipe; I know there are meters used there, the Standard meters that are worth about ten dollars apiece. I have detailed statements with me showing my entire estimate.

Cross-examination:

I didn't lay any four-inch pipe in any of the work mentioned that I did. I first went to White Plains in August, 1897, at the request of Mr. Dykeman, president of the water commissioners of the village. I don't know that his interests were adverse to those of the Westchester County Water Works Company: he was acting in behalf of the village as I understood it; I was informed that the village was condemning the property of the water works company for the purpose of taking them over, and it was in the interest of the people who were condemning the property that I went there. I worked

there from August, 1897, to about the middle of January, 1898, continuously. I had some professional work on hand which I could do at other times. I didn't live at White Plains, but was there every day excepting Sundays. While there I had charge of all examinations that were made to show what the valley of Thompson's
46 brook consisted of geologically in order to determine what was the source and amount of supply of water. To ascertain what work the water company had done in erecting this plant I measured the diameter and depth of the three wells, the thickness of the walls, the size, length, breadth and height of the building, the foundation for the pump, the style of the pump and boilers, the length of the force-main from the pump to the tank, the diameter, height and character of the material in the tank, the number of lineal feet of water pipe laid in the village, the number of hydrants on the mains, number of stop-cocks placed upon the mains, and the number of lineal feet of galvanized pipe as laid in the system. This I did at the request of the commissioners. I worked at this from August 14 to November 18 all days excepting holidays and Sundays. I was in the employment of the village and paid by it; received for my services $2,500; the system was then worth $80,000; eliminating well No. 3 and a mile and a half of pipe laid after 1893 it was worth $68,000. In that estimate I did not include the value of the real estate, but did the value of the water supply and the franchise; I called the franchise worth nothing and I called the water supply worth nothing; there are 22.7 acres of land, I think. Before the time this water company put in the plant the village had an inefficient water supply; it had no plant, it had a supply; it had a water supply by wells, that is a supply. The individual inhabitants had their own wells; that is the supply they had. I believe there wasn't any fire protection excepting the wells and from the stream that runs down through the town. I have made tests of how
47 much water can be pumped by that water supply in twenty-four hours and discovered it to be 278,000 gallons in twenty-four hours on the average of six weeks' pumping. The test I made was in October, 1897; I took the state of the counters on the pump one day, thus giving the number of strokes made by the pump; six weeks afterwards I took the same counters and subtracted one from the other to get the total number of strokes made in the six weeks; that was for the ordinary supply of the village; that is what they did pump; the average from it was 278,000 gallons per day; I have pumped so as to be able to tell you how much could be pumped by that supply in twenty-four hours; that was in November, 1897; my test lasted about fifteen minutes; I think that would make a fair test; it was a fair one under the circumstances, as at the end of fifteen minutes there was no more water to get to the pump; I didn't pump it dry; we pumped down there to the bottom of the foot-valve construction pipe; the water still remained below the foot valves; the plant might be remedied in that respect. There has not been anything done that I know of by actual test-work to show what that supply would be in 24 hours, but I do know that for the six weeks when I took the counters the supply

was 278,000 gallons per day; personally I didn't measure this watershed; I took somebody else's figures; my statement as to how much water I believe is actually at this place is my estimate; I had been at White Plains a few times before this water plant was put in.

Redirect:

Q. Why did you call the franchises worth nothing?

48 Objected to by defendant as improper, incompetent and immaterial.

The COURT: It may be asked in response to the cross-examination.

Defendant excepted.

A. The company didn't have an exclusive right to the water supply of the village of White Plains.

I also based it on a five years' period and the right of the village to take the property; the water supply I placed at nothing as it was not sufficient to supply a town that grows the same as White Plains is growing. There was not enough water in the watershed to supply a town of 20,000 inhabitants; the supply was just about enough for 5,000 to 6,000 inhabitants; therefore, I considered it an inferior supply and placed no value upon it. There are other sources of water supply available near there.

Q. Which could be connected with this system?

Objected to by defendant as incompetent and immaterial.

The COURT: I will allow him to state whether it could be connected with this system.

Defendant excepted.

A. Not economically connected with this system, no sir.

To Mr. BROWN:

To test the water supply I had a survey made; I accom-
49 panied the surveying party when the work was being done; first, to divide the watershed area into its different parts which would represent different material. The greater part of the area is composed of rock covered with a thin, fine layer of soil; the next is composed of sand and gravel formation; the third and smallest of a peat swamp, around the margin of which these three wells are situated, the wells being in the sand and gravel formation; I found that these wells could not draw upon the entire 708 acres. If the entire area had been homogeneous sand and gravel formation, and the wells placed so as to drain that area, this company would have had assured a daily supply of between 800,000 and 900,000 gallons; but as the greater part of the area was rock or peat the amount the company had from which they could draw water was just about one-half of what could have been done had the entire area been homogen-ous. In rock, which is covered by a small amount of soil, the rain is almost immediately sent into the channels, streams and rivulets in the lower part of the valley, carried off unless intercepted, to the next stream. In sand and gravel the

water percolates and is held in the sand and gravel subject to being taken out by their system of wells and pumps. Peat will also intercept water, but will not readily deliver it up. Those are the characteristics of the three formations in that valley.

Recross:

This statement which I made as to the quantity of water and the watershed is not theoretical. I have made tests upon watersheds.

As applied to this particular water supply my statement might
50 be theoretical in the sense you use it; I never made any tests at White Plains except as I have stated. If a man has any knowledge of hydraulics at all he can tell within 10,000 gallons a day of how much can be supplied at White Plains from this system from the water which is actually there now; I am able to tell within that amount; it would not be my opinion, it would be my judgment. In this formation there might not be seams in the rocks from the country above which would increase the supply of water. I know this by experience and observation. I never saw all of this particular rock that exists there. If you see forty holes in a watershed you make up your mind what exists in the forty holes exists over the rest of the area.

WILLIAM L. BANKS, sworn for plaintiff, testified:

I reside at White Plains and have for 30 years; my business is buying and selling and appraising real estate, examining titles and making loans. I know the land the Westchester Water Works Company own; there are two parcels, one near the pump-house of about 23 acres on the road running from the village onto the mountains; that land is along the road between 600 and 700 feet; it is improved under cultivation, a little brook running through. On the other side of the brook it is a wide swamp, peat swamp. The other parcel, where the tower is, is a piece lying back from the road 180 to 200 feet, a gore-shaped piece of about 80 acres, with a right of way to Broadway, and the right to lay pipes and things pertaining to the water works.

Q. What was that land worth in the spring of 1893?

51 Objected to by defendant as incompetent, immaterial and improper.

Objection overruled and defendant excepted.

A. The two parcels together, in my judgment, were not worth to exceed $4,500 to $5,000.

Q. Who is now in possession of the Westchester County Water Works Company property as described here?

Objected to by defendant as incompetent, immaterial and improper.

Objection overruled and defendant excepted.

A. The village of White Plains is in possession through their board of water commissioners, I think, since the first of September.

Cross-examination:

I don't understand the village took forcible possession of the property; I was not present. I know it took possession because I have been told so by Mr. Dykeman, the village's attorney. I have some lawsuits pending with the Westchester County Water Works Company; there is a suit between the company and myself that was brought to recover of me water rents for two hydrants, water rent which I would not pay; I didn't have the water; I don't know the amount in controversy. There were two hydrants placed upon me at different times. The amount I am sued for is between $200 and $300. In making my estimate of the value of the real estate that the company owns there I didn't value it as a water supply or gold mine or peat bed. I valued it as so much real estate without reference to the water supply. I had in view the location of the land.

52

Redirect:

The claim upon which I have been sued by the water works company is a contested one; I claim one thing and they claim another; I have offsets.

It was here admitted that the second mortgage made by the Westchester County Water Works Company was recorded on March 31, 1890, in Book 947, page 30, and also that the full amount of the $100,000 of bonds provided for by the first mortgage, were issued prior to 1893; that under the second mortgage $100,000 were held for the purpose specified, to take up the first mortgage and the bonds issued under it; that Mr. Sherman and the defendant knew, at the time of the sale of the bond to plaintiff, that it was one of the bonds issued under the first consolidated mortgage; that Mr. Sherman knew the fact about the prior mortgage and the issue of the $100,000 of bonds under it, and that they were outstanding at the time he sold the bond to plaintiff.

It was also admitted that $97,000 of the bonds under the second mortgage were issued for sale outside of the $100,000 reserved to retire the original first-mortgage bonds.

Plaintiff here rested.

By Mr. PURCELL: The defendant moved for a nonsuit on the following grounds:

First. The plaintiff has failed to make out a cause of action.

53 Second. There is no proof of fraud or deceit on the part of the defendant or Mr. Sherman, its president, in the sale of the bond in question to the plaintiff.

Third. There is no proof at the time of the sale of the bond in question by the defendant or Mr. Sherman acting for it, that the representations made by the defendant through Mr. Sherman were known to him or to the bank to be false.

Fourth. There is no proof that the plaintiff was influenced by or made the purchase of the bond upon the strength of any representation made to him by the defendant, or by Mr. Sherman acting for it.

Fifth. That the plaintiff has failed to show that Mr. Sherman in acting for the bank in selling this bond knew that the representations made by him to the plaintiff were in fact false.

Sixth. That the proofs as made show that whatever representations were made by the defendant or by Mr. Sherman acting for it, were honestly made and in the belief that they were true.

Seventh. That upon the proofs made, it appears that the only representations made by the defendant or by Mr. Sherman acting for it, were expressions of a belief or an opinion or judgment, based upon information had and received as to the value of the property which secured the bond, and were not positive and absolute statements made of its or his own knowledge.

Eighth. That it appears that the transaction in question
54 was between the plaintiff, Mr. George H. Sherman individually, and that the defendant being a national bank, was not bound by the action of Mr. Sherman, its president, in the purchase or sale of the bond in question, as the transaction is prohibited by the national banking act.

Ninth. That the transaction in question, to wit: the purchase and sale of the bond in question being prohibited by the national banking law, the defendant had no right or authority to purchase the bond and sell it to plaintiff; and therefore, so far as the defendant is concerned, the transaction having been conducted by Mr. Sherman, its president, he was not acting for it, the bank, and such transaction was absolutely void.

Tenth. That the transaction being outside of the ordinary business of the bank, and outside of the usual course of business, and there being no evidence here that the transaction was conducted or made by Mr. Sherman pursuant to any resolution of the board of directors, the bank is not liable. If, at the time this statement was made, it was made in good faith by Mr. Sherman, relying upon information which he had received there can be no recovery in this case.

The COURT: Is it admitted that Mr. Sherman had knowledge of this prior mortgage for $100,000, and that there was $100,000 of bonds outstanding under it at the time the transaction took place between him and the plaintiff.

Mr. PURCELL: We will admit that.

The COURT: As the case stands now we have got a de-
55 scription of the water-works system at White Plains as it was at this time. White Plains was at that time a village of under 5,000 inhabitants; there was a water-works system there which was been described and the value of which has been given by certain witnesses, whether correctly or not is a matter for argument. Mr. Sherman had sent his man down there to examine these works and the man had come back and made that report, which, as the case now stands, we must assume, must be in accordance with the facts then stated. That being the condition of things he is charged with knowledge of the fact that there was a $100,000 mortgage on the plant which would be ahead of this bond or which was ahead of it at that time. Under those circumstances, as the case

now stands, these statements were made, and I am not prepared to hold as a matter of law that there is no question for the jury. The motion is therefore denied.

The defendant thereupon excepted on each ground separately.

TOM T. WALLER, sworn for defendant, testified:

I reside at Mont Clair, New Jersey; my business is in New York city, for the International Paper Company. I resided in the city of Watertown from 1889 to July, 1898. I knew George H. Sherman, president of the defendant. I formerly lived in White Plains for twenty-five years; came from there to Watertown in 1889. After I came to Watertown I visited White Plains frequently. Mr. Sherman talked with me in reference to the Westchester County Water Works Company some time between 1891 and 1893; in substance, he
56 asked me as to what I thought of the water-works institution in that village. I told him I considered the village a prosperous and thriving one; that properly handled the water works there would be a prosperous institution; the particular water works which were there I knew very little about; I don't recall but one occasion I talked with him. My family owns property in White Plains. I know the state of property there before 1893 because I was interested in it. I know about the increased population there in a general way; I was there frequently; the population has increased materially; it increased from the time I left up to 1893.

Cross-examination:

Mr. Sherman did not ask me about the franchise that the water works company had, nor the contract, nor the value of the real estate they had, nor the number of customers they had. I simply gave him a hopeful outlook for an enterprise there.

FRED SEYMOUR, sworn for defendant, testified:

I reside at White Plains; have been superintendent of this water works company since May 1, 1895; I can state receipts and disbursements of the company; have a statement drawn off from the books; the first year I have is 1893; these figures represent the receipts and not the earnings, the receipts and expenditures. A large amount of the back earnings not collected; the total receipts in 1893 were $16,646.32, and disbursements for operating expenses $4,747.46; the gross receipts for 1894 were $20,526.63, and operating expenses $7,316.79; the whole $200,000 of the bonds were not
57 issued at the beginning of 1893. I was at White Plains when the condemnation proceedings commenced. I knew of the use of the money from the earnings of the company to carry on that litigation; that was done. While I was superintendent of this water company we never had any lack of water supply so far as I know. The gross receipts for 1895 were $18,623.72, operating expenses $4,580, and the gross receipts for 1896 were $20,875.38, and operating expenses $6,199.25. While I was there it was the business of others to pay this money to the Farmers' Loan and Trust Company. I know of one or two times it was paid, because I paid it direct.

Cross-examination:

The operating expenses in 1893 were $4,747.46; that includes the salaries of officers; I don't know whether it includes the salary of the president or not; I could tell by looking it up; this is the amount I find on the cash book as a disbursement; I was not there in 1893 or 1894; I find that as a disbursement, what was paid out for fuel, pay-roll, labor, etc. The cash book shows an account for total receipts and total disbursements; they are in different months running through the whole year. There was a president of the company there in 1895 who was paid $75 a month, I think, as manager; it was John V. Clark. The expenses in 1895 include what was paid to him in this way. All the petty cash I paid out for expenses, labor and everything of that kind, I entered on the cash book. All my deposits in the bank I put on the credit side
58 and turned over to the bank subject to his check. What he paid out for services of the officers of the company, except what I received myself, I don't know. I was the disbursing officer. I know nothing about the disbursements except what is in the cash book. All the money during 1895 and 1896 was credited to the company subject to the check of the president. President paid me for my services. If I didn't have enough cash to pay workmen and for needed repairs the president paid for those. All ordinary expenses right in the office I paid out of the cash. These payments went on the journal, day book and ledger; it did not go on the book from which I gave the figures, that is our ordinary cash expenses. Anything that was paid out of the cash drawer is not on my computation at all. If we didn't have money enough to pay a bill it was paid by the president and it is not included in my computation; the books from which I have made up my computations here do not show the disposition of the money which was put in the bank; a large number of bills were paid by checks; I suppose the larger bills were paid by checks; he paid the bills; these were the only items I paid in cash. I have taken, in the figures I have given, all the cash, cash receipts and cash expenses from 1893 and 1894; what was paid out by check I have not taken and I don't know anything about what they were for 1893, 1894, 1895 or 1896, only what the books show; how much there was of the other disbursements I don't know. I don't know that during 1895 and 1896 the company was issuing notes to meet coupons on the first consolidated mortgage. I think they had fires in White Plains in 1895 and 1896. I don't know of any shortage of water to put out fires when they gave in the proper alarm.

59 Redirect:

The balance of moneys received each year is shown by the statement that I have. There are books somewhere which would show those disbursements, if any, made by Mr. Clark or other officers of the company. This which I have is a summary of the cash receipts and what I did with them.

Recross:

I received all that came to the company from collections which were made. Didn't pay out except for small items.

Redirect:

In the item for disbursements, $4,747, in 1893, is including everything for labor that I found on the books.

EDWARD J. LEWIS, sworn for defendant, testified:

I reside in New York city; worked for the Westchester County Water Works Co. about three and a half years, from January 16, 1895, to present time; am now working for company as secretary. In connection with Mr. Seymour I tabulated the receipts and expenses of the water works company for some years. I am able to state that the disbursements mentioned by Mr. Seymour include all operating expenses, salaries and expenditures whether made by cash or check. The net balance would be applicable to interest, improvements, etc. The figures I have are just the same as Seymour's.

60 Cross-examination:

By going over the books I could tell what was done with the money in 1896 which went into the bank subject to the check of the president. These figures were taken from the books and represented the entire business of the company. The surplus in 1896 was more than $14,000. We had some extensions to make as I remember from this money. I could not give you the amount now. I can tell by going over the books. I know the company didn't pay all the interest on its bonds in 1896. It didn't pay the interest on its first consolidated mortgage bonds in 1896. It paid the interest of the first-mortgage bonds in 1896; that was $6,000, and there would be left $8,700 approximately for paying the operating expenses and the interest on the mortgage. A certain portion of this $8,700 went for expenses; I can't tell approximately how much; couldn't tell within $1,000. It is probably a couple of years since I made up this statement; part of the money went for extra services of clerks going through books, making up statement, and our legal expenses had begun. The village had begun to talk about taking the plant and we had to go through our books so that we understood them all. We had notice of the proceedings in 1896; they begun, I think, in August, 1896. We had extra expenses also on account of the village trying to put a bill through the legislature in 1895. We had attorneys' fees to pay and had to have people look out for our interests. I knew there were extensions called for by the contract which they had for the plant and that they were required to make; we had to make them in order to retain the franchise; the
61 village would not let up on us until they began; they pushed us in that respect to the last; it took a good deal of our money. I haven't any idea at all what the company was compelled to pay out for extensions in 1896. I was not immediately connected with putting in extensions. I have looked over the disbursements for the

year 1896 and have picked out the items I called operating expenses. I had to look at all the items for extensions. There was not sufficient money in 1896 to pay all the interest on the mortgage coupons. The trust company made a ruling at a certain day, they would not pay part of the coupons until we had sufficient in the trust company to pay all coupons of that issue, so without we had the full $3,000 in hand they would not pay not even if we had within $100. In 1895 the company was compelled to make extensions under the franchise and this $4,580 which I have given as the disbursement for operating expenses that year would leave about $14,000. In that year the company paid a certain percentage, paid full interest on the first-mortgage bonds, and a certain proportion of the interest on the first consolidated bonds and issued their notes for the balance. In 1894 the company had a surplus of $13,000, that $13,000 was not sufficient that year to pay all the coupons on the second mortgage. Between 1892 and 1895 the company put in a great many meters. That was probably worth $15,000 in round numbers the majority of them, probably $10,000 to $12,000. I won't say definitely, but a large majority of them were put in during that period. I don't know how many meters the company owned; there are hun-
62 dreds of them; I don't know how much money the company expended on them. Very few of the meters belonged to the people. I can't tell how many belonged to the company, but don't think fifty belonged to the consumers. On our books we have an inventory showing the number of meters that belong to the company; they are not in the books that we have here; these books here would be merely cash books, receipts and disbursements; these books here show the total receipts and all the smaller cash disbursements. The balance of the cash went into the bank subject to the check of the president. The cash book for 1893 which I have here shows part of the $4,700 disbursements. It shows the balance of the money received went into the bank. It don't show each individual item for what the $4,700 was paid out. I have been there since January, 1895, to date. The statements of 1893 and 1894 are the result of my investigation of the books. It made the books balance, of course it must be correct; we went into it very thoroughly. When we were providing our statement for the commissioners we made it up showing the amount of disbursements for extensions during these several years; I helped to get that up; I haven't that statement with me; didn't bring it. This statement includes all ordinary repairs outside of improvements or what they call betterments; the general repairs.

Redirect:

The Farmers' Loan and Trust Company would not take partial payments of interest; they would accept all money paid and keep it until we had sufficient on hand to pay the full issue of
63 coupons of given dates. In January, 1896, the company paid the coupons on the first consolidated mortgage bonds pretty near in full and issued notes for the balance. That accounts for $2,500 of that money, where there was such a large balance. In

making up this statement I had the cash book, the bank book and the check book, Mr. Clark's individual books and all books and papers. The company during this period paid off some floating indebtedness. It paid certain notes held by the National Bank of Westchester County, between $5,500 and $6,000, and a certain part of the village indebtedness in the neighborhood of $10,000 out of the receipts. These figures I have given are actual receipts. There is a great deal which has been earned and not collected; several thousand dollars on the books today uncollected. The indebtedness mentioned arose from certain extensions.

Recross:

Q. Was the company sued during 1894?

Objected to by defendant as incompetent and immaterial.

The COURT: I will take that now as bearing on their condition during that time.

Exception to defendant.

A. I don't remember now.

I don't remember that there were a number of suits along in 1894, 1895 and 1896 for notes and accounts against the company. I don't remember that the Central National Bank of White Plains
64 sued the company; it threatened suit and we paid out of our earnings; if suit was brought and then the company paid it was before my time; I don't remember the details of it; they didn't pay before my time; I issued a part of the payments myself; I don't know who sued the company. There was one bank sued the company on a note in 1895 or 1896 possibly; that was the Watertown national bank; it may have been as early as 1895; I was not there in 1894. It was on a note the Watertown national bank sued the company in 1895 or 1896 for $5,000; the company didn't pay it; I can't say that they have paid it; it is still unsettled as I understand it; it has not been settled that I know of; I didn't know of any other suit. A carpenter in White Plains had some small claim, $50 or $100, something like that; he threatened suit; don't know but he started one; there was a question about his owing the company or the company owing him; it was a trifling thing; we paid it; I didn't know of there being past-due paper of the company in 1895 except notes in bank and they were not exactly past due; we paid a part at each date of maturity and gave a note in renewal; there weren't any notes which laid past due; it was just the old debt we paid off.

CHARLES L. PARMELEE, sworn for defendant, testified:

I am city treasurer of Watertown and have been since April last year; prior to that I was cashier of defendant and was for ten years; George H. Sherman was the president. I know plaintiff and have known him five or six years. I don't recollect especially of
65 having a transaction with him about the first of July, 1893. The paper shown me, marked Exhibit 13, is a check filled out in my handwriting and signed by plaintiff; it reads as follows:

"WATERTOWN, N. Y., *July* 1*st*, 1893.

"National Bank and Loan Company, pay to Westchester county bond, $500; cash, $18.65.

"(Signed) MOSES PETRIE."

That check was filled up by my and signed by Mr. Petrie in my presence. At the time I took that check I have no definite recollection of what I did. I do not recollect giving plaintiff the bond mentioned in the check.

Exhibit 13 offered and received in evidence.

The paper shown me, marked Exhibit 14, is in my handwriting; it is a deposit slip of plaintiff in the defendant for $515; it says, "D bond." The writing "D bond" and figures are mine. It is not dated and without the bank book I could not tell what date it was made.

Exhibit 14 offered and received in evidence.

Paper shown me, marked Exhibit 15, is a deposit slip of plaintiff in the bank for $153.85 by Lowe. This slip is not dated.

Exhibit 15 offered and received in evidence.

The paper shown me, marked Exhibit 16, is a check on the defendant dated January 30th, 1893 payable to A. D. Lowe, $150, signed by plaintiff.

Exhibit 16 offered and received in evidence.

66 When Mr. Petrie gave me Exhibit 13 I cannot recall the conversation I had with him at that time. The only thing I recall is that at some time Mr. Petrie, the plaintiff, asked me if I thought the security was good and I told him I thought it was. On the back of Exhibit 16, the check for $150, is a memorandum "Take note five months," in my handwriting. It meant that I was requested to deliver this check to Mr. Lowe and take his note for five months. I think I remember taking Mr. Lowe's note. I never heard any conversation between Mr. Sherman and the plaintiff; none whatever that I recall. On July 1st, 1893, the defendant must have had this bond for which this check was given. The defendant bought that bond of Moffett, Hodgkins & Clarke and paid for it ninety-five cents on each dollar of the bond besides any accrued interest there was on it. The defendant sold the bond for one hundred cents on the dollar. At the time this check, Exhibit 13, was drawn on July 1st, it would seem from this check that I paid him cash, $18.85. The check states that I paid him a bond and cash $18.85. If this check was dated July 1st there would be just $500 due on the bond after the interest was paid. It appears from the check that it was drawn July 1st, 1893, and paid July 3rd, 1893. I do not remember whether July 1st was on a Saturday. I noticed the check is dated July 1st and marked paid July 3rd. Checks were charged up at about 11 o'clock on Saturdays and after that hour would be counted in cash that day and charged up on Monday.

Mr. Sherman sold other bonds of the same issue as the one to plaintiff; he sold approximately $20,000 to $25,000 to the best of my recollection.

67 Q. Can you state to whom he sold them?

The COURT: How is that material?

Mr. PURCELL: As bearing upon his good faith.

The COURT: I don't see how.

Mr. PURCELL: I offer to show that he invested in these bonds trust funds, and that he sold them to his relatives.

The COURT: I think that is too remote. I will allow you to show that the bank sold $20,000 to $25,000 of other bonds of this issue. I don't think it is material to show the details of it. You may go to the extent of showing he took some of them himself if you choose, I will let you show he took these bonds either individually or in his capacity as trustee; but the fact that he sold some bonds to his uncles or cousins, that is too remote.

Mr. PURCELL: I will take an exception.

I knew of Mr. Sherman having moneys belonging to one C. S. Murphy for investment. Murphy had deposited his securities and money with Mr. Sherman for investment and Mr. Sherman with that money bought $4,000 of these bonds for him. Hiram Hubbard was a relative of Mr. Sherman who made investments for Hubbard's estate after consulting with the representatives of it; he invested for that estate $500 in one of these bonds; he also made an investment of $2,000 in those bonds from a trust fund he held for his sister, Mrs. Dr. Lansing. Mr. Sherman, I think, was guardian for Georgia Hubbard, his niece, and he invested $1,000 of her

68 money in these bonds. Ward Hubbard's estate had moneys deposited in the bank and for that estate there was $2,500 taken. Mr. Ward Hubbard was an uncle of Mr. Sherman. Mr. Sherman sold some of these bonds to Miles Strickland, a customer of the bank and who had been for a good many years.

Q. How much was sold to him?

The COURT: I think that is outside of the limit I have allowed. I will sustain the objection.

Mr. PURCELL: Your honor will give me an exception.

I know Mr. Fred M. Boyer; he is a nephew of Mrs. George H. Sherman; he was brought up by Mr. Sherman, lived in the family with him; Mr. Sherman had some of his funds for investment and with them he bought some of the bonds like the one in suit; I could not say to what amount. For all the bonds so sold the bank paid ninety-five cents on the dollar. Mrs. Parnelle Hubbard was Mr. Sherman's aunt. There was some money deposited in the bank belonging to her and with it he purchased $2,000 of these bonds. With reference to these slip deposits that are not dated it was customary to keep all deposit slips of one date together in a bundle, the top one perhaps would be the date of the rest of them and they were transferred to the books. Before the purchase of this issue of bonds the bank had possession of some of the first-mortgage

bonds. These first-mortgage bonds were purchased commencing, I think, April 14, 1892; I don't know whether this is the time or not. I don't remember when the first consolidated bonds were placed on the market. The last purchase of the
69 consolidated bonds was March, 1893. Mr. Sherman advised me in reference to the advisability of buying these bonds. I know personally that he also talked on the subject with a Mr. Mitchell. I remember his talking with Mr. Mitchell and Mr. Waller; I think he talked with Frank Hinds; I don't recall any others; I didn't go to White Plains myself; I never have been there, I never told Mr. Petrie that I went there. Mitchell had formerly lived at White Plains and moved from there to Watertown; that was also the case with Mr. Waller. They represented to Mr. Sherman that the population of White Plains had grown quite rapidly; that it was a suburb of New York city and a prosperous village; that the value of property had increased quite rapidly. The Westchester County Water Works Company was originally a Watertown corporation, with offices here. I don't remember when the offices were moved from Watertown. I know at one time that Frank Hinds was connected with the company; he resides here; is an engineer and surveyor and had something to do originally with the plant; he was a member of the firm when this plant was built. In my talk with Mr. Sherman upon the subject of taking these bonds I stated to him that I believed that they were a good, safe security. I knew about the issuing of the second mortgage, for the purpose of consolidating the first-mortgage bonds of the second issue. Mr. Sherman knew about that. I learned that the second issue was to take up the first $100,000 issue and that additional bonds would be issued by the Farmers' Loan and Trust Company as extensions were made, and upon the certificate of the water works
70 company that the extensions had actually been made. Mr. Sherman knew that.

Q. When the first consolidated bonds were issued you assumed that the extensions had been made and the bonds issued pursuant to that.

Objected to.

Objection sustained and defendant excepted.

Q. Did you hear Mr. Sherman say anything upon the subject of the extensions having been made as founded upon the fact that the consolidated bonds were being issued?

Objected to by plaintiff.

Objection sustained and defendant excepted.

I know Mr. Sherman had a conversation with Mr. Clarke, one of the partners of Moffett, Hodgkins & Clarke, on the subject of these bonds before he purchased; I can't recall the conversation; I know he had conversations with him. I talked with Clarke upon the subject of the bonds before the purchase. I don't recall that I reported to Mr. Sherman what Clarke said; I knew he had talked with Clarke. We had a circular issued by Moffett, Hodgkins &

Clarke Co. relative to these bonds before we purchased any of them. Paper shown me, marked Exhibit 17, is the circular; it was there in the bank; Mr. Sherman saw it and I talked with him about it and the number of bonds which were authorized to be issued, and the number which had been issued.

Exhibit 17 offered and received in evidence.

71 EXHIBIT 17.

Office of Moffett, Hodgkins & Clarke Co., 34½ Pine St., New York.

The Westchester County Water Works Company, White Plains, N. Y., $25,000 Twenty-year Six per Cent. Gold Bonds.

Denominations, $500 and $1,000.

Due July 1st, 1906.

Interest payable January 1st and July 1st.

Principal and interest payable in gold at Farmers' Loan and Trust Company, trustee, New York.

No option to redeem before maturity.

Population	8,000
Assessed valuation	$2,183,000
Real valuation	6,000,000
Capital stock	100,000
Bond issue authorized	$200,000
Held unissued by trustee for extensions	51,000
Total bonds outstanding	$149,000

The above $51,000 of bonds are held by the trustee to be issued when extensions are made, the cost of which equals the face value of the bonds released and when the net income will pay 6 per cent. interest.

Revenue.

Hydrant rental	$3,968	
County buildings, flushing sewers, railroads, private consumers, etc	9,750	
Private consumers (extensions)	900	
		$14,618

72 *Expenses.*

Interest charge on $149,000 of bonds	$8,940	
Operating expenses about	2,450	
		11,390
		$3,228

The city rentals for fire protection, railroads and other public rentals are pledged and fully guarantee the interest on the bonds.

The system is built in a thoroughly first-class manner with cast-iron mains, duplicate Worthington pumps of 3,500,000 gallons capacity in 24 hours, duplicate boilers, heaters, etc.

The water is pumped into a steel water tower 20 x 80. The supply is from caissons sunk near a large spring brook providing an abundant supply of pure spring water of exceptionally fine quality, pronounced by chemists second to none in the State. During the drouth in the late fall of 1891, when there was a very great scarcity of water throughout Westchester county and when the water supply for New York city and suburbs was reduced to a very small amount, and threatened to fail altogether, the supply of the Westchester County Water Works Company was the only one in that region which continued abundant. There was no depreciation whatever in the supply.

White Plains is the county-seat of Westchester county and lies 23 miles north of New York on the Harlem railroad. It is a village of very handsome suburban residences and is rapidly growing.

73 The Bloomingdale Asylum for the Insane, now located at New York, has acquired extensive property in White Plains and is about to remove there. This will bring the water company a large additional revenue.

White Plains is growing rapidly and the water plant is constantly being extended to meet increasing requirements. Extensions have recently been made, the income from which will add a handsome amount to the earnings within the next few months.

The water company owns 26 acres of land about the pump-house which is today very valuable property and is rapidly increasing in value.

Price par and accrued interest, subject to previous sale and to advance in price without notice.

The memorandum I have of the last purchase of the consolidated bonds is March 20, 1893. I am not able to state when the first of the consolidated bonds were purchased except from the memorandum which I have which shows that it may have been April, 1892. After the purchase of these bonds we heard of other banks purchasing the bonds. By looking at the bank books I am able to state that the deposits mentioned in Exhibits 14 and 15 put in evidence which have no date were as follows: Exhibit 14, $515, February 1, 1893; Exhibit 15, $153.85, June 28, 1893.

Cross-examination:

Both of these checks are in my handwriting; I must have drawn them by plaintiff's direction. This represents the only deposits I know of by plaintiff in the bank. I do not know whether

74 the deposit of $515 was handed to me by Mr. Petrie or by Mr. Sherman. Mr. Sherman occasionally did hand me money given him in the back room, telling me to make up a deposit slip for the person who had done so. I can't say that Mr. Petrie had

any personal communication with me at the time the deposit of $515 was made. The $153.85 was left there for him by Mr. Lowe. Those are the only transactions I know of with the bank and Mr. Petrie. Mr. Petrie did not have a bank book.

It is conceded that the vouchers are produced by the defendant.

I have no recollection of Mr. Sherman handing me that money, or any recollection that plaintiff handed it to me. A memorandum "D bond" is my writing. I don't know whether anybody directed me to make it nor how I came to make it except it was stated what it was; I must have been given the bond at that time; I don't remember the bond; I know it must have been the bond and not the proceeds of it; it must have been the bond itself, but I don't recollect what it was. I never went to White Plains; no one went there to investigate these bonds for the bank to my knowledge. The bank didn't have any search of the Westchester County Water Works Company property. Before the purchase of the bonds I had never seen a copy of the franchise of the water works company in the village of White Plains, nor had the bank to my knowledge; or the contract of the Westchester Co. Water Works Co. with the village of White Plains for the construction of water works; nor the bank to my knowledge. I was the cashier of the bank dur-
75 ing all this time. I didn't know that the home office of the water works company was at Watertown. I didn't have a copy, nor did the bank have a copy of the first or second mortgage. I knew that there was a first and second mortgage; we knew that the bonds issued on the first mortgage were not in fact surrendered by the holders upon the issue of the second mortgage. I understood that the first-mortgage bonds were outstanding as first-mortgage bonds and that the first consolidated were in fact second-mortgage bonds. I talked that over with Mr. Sherman. I never saw any annual report of the water works company as a corporation. I didn't know it was a New York corporation; didn't inquire to my recollection, nor was there any such inquiry made by the bank to my knowledge. These bonds were purchased of the Moffett, Hodgkins & Clarke Co., who I understood were the owners also of the Westchester County Water Works Company, or substantially so, and while it was two corporations they were the same individuals substantially; they owned the stock. That was the information the bank had at that time. I had correspondence about the purchase of these bonds with the Moffett, Hodgkins & Clarke Company. I could not say where that correspondence is; I do not know that it is not in existence; do not know that it was destroyed by the bank; I do not know that it was taken away from the bank. At the time of the Carr trial I was not in the bank. I know you asked me if the correspondence was destroyed; I know that it was destroyed if it was not in the bank; it must have gone out with the old papers. My recollection is I
76 paid the coupons on plaintiff's bond down to January, 1896, as he presented them. I knew that the company failed to pay interest on the bonds promptly, that is, they failed to pay wholly in money; I don't remember the date; I remember that they did pay

some in script and some in money and we paid Mr. Petrie in cash whenever he presented a coupon. I think the water works company gave notes for a number of years for a part of the interest. We took the notes and paid the interest.

The bank correspondence down to and including 1894 was destroyed some time in the year 1896. I think I took out a number of letters from the vaults myself, principal part of them; they were carted away by a cartman whose name I couldn't say; this correspondence was destroyed by my direction; I think it must have included the correspondence with the Moffett, Hodgkins & Clarke Co. as it was not found in the bank. Mr. Sherman was not legally appointed trustee for Mr. Murphy; he was his agent; I think he had the power of attorney; Murphy lived in Vienna for a number of years. Mr. Sherman took the bonds for Murphy of the bank; he performed the entire transaction himself, both for the bank and Murphy. He sold the bonds to the Murphy fund for one hundred cents on a dollar. Mr. Sherman owned one-half the stock in the bank; he performed the entire transaction so far as Mrs. Lansing's fund was concerned; he transferred that at one hundred cents on a dollar to the fund. Bond No. 217 was bought of Moffett, Hodgkins & Clarke by the bank March 22, 1893. The bank held and owned that bond from March until July. I made no investigation in relation to these
77 bonds last purchased. Whatever investigation I made was before the purchase. I understood Frank Hinds had had part charge of the construction of the water works; he was a member of Moffett, Hodgkins & Clarke Company at the time the works were built; I had so understood. He had not got out of the company when the works were built, which was in 1886. I think Mitchell lived in Watertown five years; Waller came with him; they lived together.

Redirect:

It was customary to destroy the bank correspondence; there was no definite rule about how often; when it accumulated and got in the way we got rid of it; the bank destroyed the correspondence at regular intervals and if it was destroyed the correspondence between the bank and Moffett, Hodgkins & Clarke probably went with it; that is all I know about it. I ordered the cartman to take the correspondence away; it was not taken with any purpose or design to destroy any particular correspondence, but following out our usual course with reference to the destruction of correspondence which had accumulated.

Recross:

I knew in 1896 that there was difficulty about these bonds which had been sold by the bank; questions had arisen between the bank and purchasers at that time.

Redirect:

At the time the correspondence was destroyed, I didn't recall
78 anything about it; didn't connect anything in relation to that date; had no thought of it; that correspondence probably related to the sending of bonds, asking us if we wanted to purchase something like that, stating what they had on hand; it may have recited the value of the bonds and like that; a circular.

Recross:

It never occurred to me that the correspondence would ever be of any use. I had no talk with Mr. Sherman about that correspondence. Mr. Sherman died in the early part of 1897; he left home for a southern trip, I should say in November 1896. I could not say when the correspondence was destroyed; I don't recall it.

GEORGE C. SHERMAN, sworn for defendant, testified:

I reside in Watertown; am now president of defendant; I am a nephew of the late George H. Sherman; he died in February, 1897. At the time of his death he was president of the bank and I was vice-president; he had been president for thirty years devoting his entire time to the business; he owned substantially half of the stock; himself and wife just half; the stock of the bank at that time was $75,000. My father's estate and his heirs owned the other half. My father died in 1882, leaving a widow and six children. George H. Sherman left a widow but no children. I did not work in the bank at the time of uncle's death; I had worked there. My duties in regard to the bank were in consultation with uncle; not in regard to detail work. My attention was first called to the bonds in question in 1891 or 1892, before we had ever pur-
79 chased any, by my uncle. He talked with me relative to the advisability of purchasing the bonds many times. I am not clear that I knew the difference between the first and the consolidated at that time. I made some investigation myself relative to the bonds or their value. I was familiar with the water company from its outset. At the time they were organized I was assistant treasurer of the Watertown Steam Engine Co., which sold the water Co. some boilers in August, 1896. I cannot say now what I did in reference to looking up the water company. We looked the company up in a general way, as we did for customers. Prior to the purchase of the bonds by the bank I talked with uncle upon the advisability of purchasing; I don't think there was any talk between us in which I gave him any information relative to the value of the property, but to White Plains itself and the desirability of purchasing them. I had no absolute knowledge as to exact value of the property but as an investment I had judgment about it, and advised with him in regard to it; I obtained that judgment from conversation with Mr. Mitchell and Mr. Waller; Mr. Mitchell and I were very intimate friends. I had been to White Plains several times before the purchase of the bonds; at the time I went before the purchase of the bonds I simply went because I had nothing else

to do; went to Mount Vernon one Sunday to visit some friends. It was Sunday when I was in White Plains; I didn't see anybody; I walked around the place; I said to my uncle that the Westchester bonds were a good investment; he told me that he would talk with Mr. Mitchell about it; I knew that Mr. Mitchell had been a real-
80 estate dealer in White Plains and a broker in New York. I learned only in a general way relative to the increase of population at White Plains.

Cross-examination:

At the time I went to Mount Vernon I didn't look at any water works; I think I drove out and saw the water tank and outside of the building; I could not say when that was; to the best of my belief it was prior to 1892; it was before the bank had handled any bonds I think; I won't swear positively. I didn't start there for the purpose of looking up the bonds at all; I took the drive partly for pleasure, to observe the town; I was alone. I didn't know how much land the company owned; it was stated to me there but I didn't know. I didn't know the land the company owned; didn't know how many miles of pipe they had; didn't know what their franchise was. I was informed in a general way about the franchise; talked with my uncle about it; got no information in regard to that question except from him; talked with him after the sale of the bonds as well as before. I never saw the franchise until today. I don't think I knew that the bank was handling second-mortgage bonds; my impression is that I didn't know anything other than that the bonds were first-mortgage bonds; I supposed they were. In 1886, when I say I looked up this water works company generally, it was located here in Watertown. I don't know that I inquired of them; we followed the ordinary course; we sold on credit; I couldn't say how much credit without looking it up. Moffett, Hodgkins & Clarke
81 lived here in town and were persons of fair individual credit; we sold directly to Moffett, Hodgkins & Clark as a firm; they were the contractors for the construction of the works; I think Mr. Hinds was not then in the concern; was not in the concern when we billed the boiler to them; these boilers were to start the work in operation. I think Mr. Hinds was then out of the company. We generally ascertained and knew about credit before making sales. I cannot tell a single inquiry I made of the individual credit of Moffett, Hodgkins & Clarke of any person or of any collection agency only in a general way.

Redirect:

The steam engine company took commercial reports at that time, both Dunn and Bradstreet. The custom was always to look parties up; we would not ordinarily do so with a concern at home; we would rely upon our own information rather than that.

FRANK A. HINDS, sworn for defendant testified:

I reside in Watertown; am a civil engineer and have been for about thirty years; have built water works; have had to do with water works of Watertown for eighteen or twenty years; have been one of the water commissioners here for that time. I was interested in building the works in Canandaigua, Cortland, Fulton, Adams, Waterford and some cities in the West. I have made it a business to keep myself advised as to the cost of the construction of water works. I was formerly a member of the firm of Hinds,
82 Moffett & Co. That was the original firm; Mr. Moffett and myself, afterwards Mr. Clarke and Mr. Hodgkins; I ceased business with that firm in the early part of 1896; before that nothing more had been done relative to the construction of the Westchester County water works than the petition for permission to form a company. I think the petition or paper bears my name and was done before my selling out; after I sold out possibly I did some work for the new company in the way of talking it over. I had been to White Plains once or twice in the early years; I can't tell just when it was, I think before selling out; it was before anything was done towards building. All I had to do with locating the water supply at White Plains was in talking about it with Moffett, Hodgkins & Clarke in a general way. When I was there I saw the place where they afterwards built the water pumping station and other places were pointed out as possible supplies. I went to White Plains next after I sold out in 1896 or 1897 to look over the plant and water works and town and water supply in relation to the proceedings that the town was instituting to take over the works. I made a thorough examination of the water plant. I was there frequently, two or three days at a time, but made a number of visits. I went over the country around about White Plains from Kensiko reservoir to Dry lake, through all that part of the country to the Connecticut State line, looking over the country to see whether the water supply of this company was as good or better than any others, or what other possible source of supply there was. I informed myself as to the area of the watershed. The watershed was surveyed by parties, residents of White
83 Plains, and from their figures I got the area. The watershed tributary to the present water supply was surveyed by parties in the employ of the water company. I looked the area over myself, walked over it and examined it. Irrespective of the survey I can give a judgment of the area; I should think it was seven hundred acres; I judged it to be correct from walking over it and examining it, also from a geological map of the United States, which shows the contour of the hills and valleys. By examining this I verified it. I examined as to the levels of the Dry lakes there and the Kensiko reservoir, which surrounds this watershed in a semicircle; the elevation was one hundred feet nearly above the level of the pumping station; the distance is from a mile to a mile and a half from the station to the lakes. I thought there was a possible chance for the water to percolate through the ledges of rock and aid in the supply. I noticed the position of the water works. The sit-

uation in relation to the Bronx River valley is such that if the water is drawn to a low level at the location of the water works, it would, no doubt, get accessions of water from the ground water in the Bronx River valley to which it is tributary. That was the judgment I formed from the observations I made. In connection with the value of the water plant the water supply is one of the necessary parts; it is the foundation of the business. You can have no business in supplying water unless you have water. I considered this the only proper and good supply for supplying the village of White Plains. There were other places where water could be had,
and perhaps in sufficient quantities, but none of them free
84 from pollution. Aside from the water supply the company owned in the vicinity of twenty acres of land about the pump-house. They owned a lot in the middle of the town with the water tower on it. They owned buildings, the pipe system and iron pipes, hydrants, gates, valves, pipes laid to the houses; they had some five hundred or more water meters in use, with other property, such as goes to make up the water-works plant. It would take a long while to describe all those things; it was all there doing service and had been for a number of years; this examination was made by me in the summer of 1897. I don't think I separated the property from what it was when I found it in 1897 to what it was in 1893. There were certain extensions made from time to time each year. I don't think I could tell what the extensions were from July 1, 1893, up to the time of my examination; I found what they called the new well; I examined all the wells. Assuming that the water works which I found in the summer of 1897 were the same as on July 1, 1893, with the exception that there had been a new water well sunk, No. 3, and about one mile and a half extensions and piping made, I say that the fair value of that entire system on July 1, 1893, inclusive of the franchise, was about $340,000. I have separated the different items and made a price upon each, which went to make up the whole. My estimate in the first instance was made with reference to the value of the property in 1897. In making my estimate for July 1st, 1893, I drop out two things, the third well and the mile-and-a-half extension which I don't know just what it would be; I allowed $10,000 for it. I was called
as an expert on the condemnation proceedings. It was my
85 opinion then that the plant was worth $350,000 and that is my opinion now. It included the water supply. I don't think I included any real estate as real estate. I included the water supply and all the plant buildings, everything which had been done and all the structures and connections and business as a plant already located and doing business in White Plains, and the character, quality and the quantity of the water supply. I found the quality of the water very excellent and the supply was ample for the present needs and for probably a long time in the future. The amount of water *per capita* estimated for use in a village like White Plains per day, is 60 gallons; that is for every man, woman and child; as to the actual amount used it varies; there are no two towns alike; some use much more than that and some much less;

sometimes there are a large number of elevators to supply, running by water. The larger the cities grow the more they are confined to paying for what water they use and the less water they use *per capita*. They are not all alike or anywhere near it. Four-inch water pipe is used in nearly every city or village of the United States. I consider it a proper and efficient pipe for certain purposes. There are places where it would not be proper. It is usually used at the ends of the line. The remote part from where the supply comes in crossing from one street to another where there are two large mains running along parallel streets, it is used for connecting. In a good many places where only a small quantity of water or small fire service is needed, a four-inch pipe is ample, and if properly made I think will last just as long as any other pipe.

86 You can usually draw two good fire streams from any given line of four-inch pipe. That is about the same as any hydrant will give; the ordinary hydrant is made with two nozzles; it is a special hydrant if made with any more than that; I think at White Plains it is a two-nozzle standard hydrant. I doubt if they have any others; I didn't see any. I am a water commissioner of this town and have looked after the mechanical part of the works. We have a large number of four-inch pipe at Watertown. We get good fire service from it; there must be from eight to ten miles of it in Watertown. As pipes are now made and laid I don't think I can tell the life of a four-inch water pipe; it has not been in use since cast-iron pipe was made in this way long enough to find it has been destroyed or sensibly depreciated. We dug up pipe which has been down eight to fifteen years and it appears just as good as the day it was put down, aside from some accident. That pipe at White Plains is of this particular kind; it was laid within the last ten years, was made by a good foundry as I understood it; well coated; therefore, ought to be just as good today as the day it was put down. To inform myself as to the daily consumption of water at White Plains I looked over the pumping register and inquired of the man who operated the pumps and in that way ascertained first as to whether there had been any occasion when they were out of water when they didn't find enough from the ground to supply the drain. I found there had been no occasion when there was any shortage which was chargeable to lack of water and they were pumping some 350,000 gallons with occasional days as high as 500,000. The pumps were actually taking that amount of water. I examined the records of the rain gauge that was kept

87 at Kensiko dam within about a mile of this pumping station, and less than two miles from the same watershed. I don't know about the accuracy of the gauge, except as to get it from the report of the city officers. I got my information from the records kept by the department of public works of the city of New York; the Kensiko dam is one of the New York city supplies.

It was here conceded by the plaintiff that there was an average rainfall of forty inches.

Assuming that the rainfall was forty inches the capacity of that

watershed was about 1,100,000 gallons per day. I made a plan for making a test of the actual water which could be obtained from the well. All I know about its being carried out is from hearsay. In my judgment a competent and proper test of the supply of water at White Plains cannot be made by pumping for fifteen minutes.

Cross-examination:

If in fifteen minutes all the water was exhausted I do not think it would be a good test under the circumstances, because the water does not come in that way to these pumps. It might be a test of the capacity of the pumps to lift water; the capacity of the holding reservoir when the water was gathered, to hold the water; how much water there was ready for the pumps. These three wells were the only ones that were built. If at the end of fifteen minutes every drop of water was exhausted from those wells I would not say at all that that would be a very proper test as to their capacity to furnish water. I don't think that would be any test as to
88 the ability of the ground to supply water in that particular place. You could take all the water out of the wells in half that time if the pumps were twice as large; in one-quarter of it if they were four times as large. I don't know the capacity of those pumps. I don't know what the capacity was under the fifteen-minute test. I was there and I saw the pumps and figured on their capacity; they were not very large; they didn't pump over about one million gallons, I guess. A pump of that kind will pump about two hundred gallons in a minute. I know what pumps they were using. I will say about 700 to 1,000 gallons a minute; in fifteen minutes, fifteen times that; that would not have anything to do with how much you would get in the next hour. The water does not sometimes rush in and sometimes comes slow; I think it comes very slow in the natural process, through the bottom or sides; the natural process of coming through the soil. It does come more rapidly at one time than another; it varies quite a little, according to the condition of the water in the wells; when the well stands full there is no water coming in. At the different times in different stages of pumping there would be a difference in the amount of water which would rush into the wells; I don't think there would be any great amount of difference in the water coming into the wells between the different seasons. There would be a vast difference between the stages of water in the well; when the well stands full there is no water running into it. The situation never has occurred where they were using all the water that came into the well as fast as it run in. If they were using all the water as it
89 came into the well I doubt whether there would be a very large difference in the amount at different periods of the year. It does not get its water from occasional showers; it gathers it up and keeps it in store, and that being so I do mean to say that if the wells were pumped dry in fifteen minutes that it was not a proper test of the water system. In estimating the watershed would yield one million gallons I didn't take into consideration water coming from the Bronx river or any other source except from the watershed

of 708 acres; fifty per cent. of rainfall would be available for water supply; the other fifty per cent. is lost by evaporation, growing plants, etc. Fifty per cent. of forty-inch rainfall on 708 acres of land makes 1,100,000 gallons. I understand that the water company owned about twenty-three acres of land at White Plains, and the watershed consisted of 708 acres owned by other parties. The water company had no control over the other land excepting they could prevent any one from going on the land and polluting the water supply. I think the company could prevent others from digging wells on the balance of the 708 acres. That is a question of law, however. The water works company are the owners of the stream of water at the base of the 708 acres and have the right, as I understand, to have the stream come down to them in its natural condition. In figuring the value which I have put upon the water supply I assumed that the company had a right to take all the water which came from the 708 acres of watershed. Assuming that this water company didn't have an exclusive right to all the water in the watershed, I think that would make a difference in my valu-
90 ation of the water supply. If we take the water supply out it would be a very serious matter. In my valuation I have not assumed that any person could erect buildings additionally on the 708 acres; I only assume the water came to the company as it is now coming. Assuming that people could purchase the balance of the 708 acres and erect buildings upon it I think I should not change my valuation of the water supply on that account. I have assumed they would not be allowed to pollute the water. This 23 acres is situated at the bases of the water supply. The water flows there in spite of everything. I am assuming that cannot be changed. Assuming that the water supply could be destroyed I would take that into account in putting my valuation upon it. If destroyed its value would not be anything. There was something over 500 water meters in White Plains; my recollection is 588. When I first went to White Plains I spent a week or nearly that looking over this plant; then after an interval of ten days I was there and spent three or four days; then another short interval and I was there and spent two or three or four days; that occurred for varying intervals for two or three months; spent two or three days a week for two or three months. That was during the time the matter was before the commissioners. I never was interested in the Westchester County Water Works Company; I went there to qualify myself as a witness for the company, so that I could give evidence before the commission. I went at the request of the company; Mr. Clarke wrote me a letter; he was president of the company; was here yesterday; I don't know whether he is today, have not seen him. I think he has been connected with the company
91 from the beginning. I examined the different kinds of soil in this 708-acre watershed. This soil is sand and gravel, rock, some peat, a little gravel and clay; all kinds of soil you will find usually in that vicinity. In figuring on the watershed I omitted one-half of the area as not being an area, which would take any water at all. The other half I used as permeable soil and placed it

at ten feet deep, all over the 708 acres, and allowed that one-fourth of every cubic foot of soil ten feet deep would hold one-fourth foot of water. I threw out the half to be safe on account of the rocky area; I did dig holes in the soil, a dozen of them. I saw samples of the soil taken out by Mr. Ryder, who made an exhaustive examination of it. I didn't see the soil when it was taken out; I saw a sample of what he told me was taken out. All I did myself was to dig ten or twelve holes over the 708 acres. I walked over it, examined the area, paced across it, summed it up together, and made a general estimate. The peat as it showed was in swampy surfaces. I don't know how much of the half of the 708 acres was peat. Whatever there was of impermeable soil was thrown out in the one-half. One-half of it. I assumed was sand and gravel; the other rock or peat, whatever it was. I am able to testify that more than ten per cent. of the 708 acres was sand and gravel; by these ten or twelve holes I dug and walking over the territory. The village of White Plains has a sewer system. If all the houses drained into that sewer system it would be an advantage to the water supply; I know it is not the fact that all do drain into the sewer. The amount of four-inch pipe in the village of White Plains is 24,748 feet, a
92 little over four miles. There is something like seventeen miles in the whole system. The fire-hydrants are distributed throughout, some on the four-inch pipes and some on the larger ones. The openings in the fire-hydrants there are two and a half inches. Two of those nozzles would not be more in area than the four-inch pipe, or very little if any. The fire-stream is about one inch in diameter; they use three-fourths, seven-eights and an inch and an inch and a quarter; there is usually a variety of nozzles. If there was a fire in White Plains where this four-inch pipe system would be used there would be sufficient supply of water where it would be necessary to use a number of fire-hydrants and there would be a proper supply for fire purposes. One hydrant could be used with two streams or two hydrants with one stream each, upon one of the four-inch lines. To use more than that would be to a disadvantage. If there was a large fire they would be near enough to other hydrants leading from other pipes to use others.

Redirect:

The place where the pumps are set is at the foot of the watershed; at the foot of a valley of 708 acres that gathers the water and pays it out down towards the pump. Ordinarily there is a stream of water that runs through to this point where the pumps are situated. It is called Tompkins brook. It conveys the water from the shed down to the wells, the result of the rainfall falling on the watershed and running off, what is not pumped, and carried into the city; building a well upon the side hills at any point would not in the least affect the quantity of water which would flow down into
93 this stream and into the basin. There is probably no well but what most of the water could be pumped out of if the pump is large enough. That would be so as to the lake if the pump could be made large enough. When the water is pumped out of

the bottom of the well it flows into it more rapidly than at any other stage, because there is a greater fall and the water is rushed into the well with greater rapidity than it would be if the well were half full. If it is entirely full it would be level; there would be no water flowing in it; a large pump would pump the water out exceedingly fast and it would take perhaps half an hour for the water really to get under motion; continuously pumping in a well at a uniform rate would obtain more water from it than intermittent pumping down to the bottom and letting it fill up. The pump in a system of that kind should be so adjusted as to pump in relation to the flow of water in the well, and it should be so in making a test if they are to get at a true result of what could be obtained from the soil. Lowering the pumps in these wells would increase the supply. Well No. 3 is not down where it might be; it is too high.

Recross:

This stream of water does not run directly into the wells. The stream is the flowing off of the watershed. This 708 acres varies in kind of land; some is pasture, some forest, some slopes on a side hill; some flat; nearly every description of land. I don't think there is very much of it cultivated. It is all in what you might call a wild state except pasture. I know there are seventeen miles of
94 water pipe in White Plains only from the record. In making my estimate of the value of the water supply at White Plains I made an estimate of the expenses of the cost that it would require to build all of the works and appliances and buildings, pipes, hydrants, valves, etc., that were there as the mechanical plant of the water works at $182,000; that is the actual cost of the plant itself to go to work and build it anew. The remainder of the $350,000 I estimated was due to the water supply and the business, and the fact that White Plains was a suburb of New York city and so close to it, that its business would be unfailing. All of those things taken into account, I set the water-works business, in the summer of 1897, as worth $350,000. We made a basis of $168,000 for the franchise and water supply outside of the cost of actually replacing the plant. I didn't figure in arriving at that basis upon the agreement between this company and the village of White Plains whereby the village was entitled to take the property at any time it wanted to at the end of each five years, at actual cost with ten per cent. added. Assuming that the village at the end of each five years of the contract was entitled to take the plant at actual cost with ten per cent. added, I would still say that that would not make any difference in the value of the business of supplying water to White Plains. I don't know how it might be as to the value of the plant to the Westchester County Water Works Co. if the property could be taken at cost with ten per cent. added. That would depend upon what the actual cost means. I make my estimate also because of the fact that
95 White Plains is a growing place, and also the character and quality of the water supply itself, being almost the exclusive water supply to be had, and the desirability of the population that takes the water, their ability to pay, all taken together, it makes a

very valuable plant. It might belong to one man or another; that has nothing to do with the value; that is the way I made the value.

Redirect:

A four-inch round pipe discharges more water than two 2½-inch pipes. The rule in that regard is that the capacity is in proportion to the square of the diameter. There are a few buildings on the 708 acres; it is rather a wild country up in a ravine among the hills.

It was here admitted that the proceedings taken by the village of White Plains to take over these water works as property were so taken pursuant to chapter 769 of the Laws of 1896 enacted for that purpose.

Defendant here rested.

THOMAS STRATFORD, recalled for plaintiff, testified:

I made a careful estimate over the whole 708 acres to find out just how much soil there was, gravel and sand, and in doing so took accurate measurements of different plots of sand and gravel and found upon the entire tract a little less than 75 acres of sand and gravel and 18 acres of peat. I have computed what a rainfall of forty inches upon this 708 acres would yield, allowing fifty per cent., which
96 could not be reached for the purpose of supplying the village, and find it 820,000 gallons a day; these would be the figures upon the theory that all the water would either be held in the soil or in the storage reservoir which could be drawn out. In the area in which the water must be stored subterraneously, in sand, gravel, peat, there would be certain areas that could not be reached by the pumping capacity of the wells as at present located. The water is hindered by friction from the material through which it passes in reaching the wells. There is a limited point beyond which you could not affect the water in the subsoil. That would be about 3,500 feet distant from the wells. Any point of area 3,500 feet from the wells could not be affected, that is, it could not be drawn out of the soil unless the wells were deepened, which would require an entire change in the wells and in the pumping machinery. About 125 acres, including the 23 acres which the company owns, of the 708 acres are necessarily tributary to these particular wells within the 23 acres. The balance of the tract would not be necessarily tributary to it if proper intercepting wells were constructed.

Cross-examination:

I do not want you to understand that I have surveyed this 708 acres at every particular point to a depth of 20 to 30 or 40 feet. My conclusions are not theoretical so far as sand and gravel formation are concerned. In all cases below the point where the rock was exposed a sufficient number of test-pits were made to determine what the material was from the crest of the ground to the rock or under-

lying material. I made about 200 altogether over about 150
97 acres. The balance of the land is exposed rock except at a low point in the valley. I mean to say that there was nearly 150 acres of exposed rock in that area. I didn't survey the rocky area. I surveyed the area outside of the rocky area; I ran the test-pits from the surface of the ground to the underlying rock in some cases 100 feet in depth. It is contrary to my knowledge of that formation that there is no place between some of the rocks where water can be held and pass down to the watershed to this stream. I do not assume pretty largely as to what the formation is below this surface. I went down to see in these 200 different places. Any point north and east of the point where rock was exposed I didn't go down; south and west I did go down. Water did run off from this rocky area down into the area of this soil. The rain falls upon the rocks as well as upon the land, but passes down quicker. The whole area is just as large to catch the rainfall, whether it be rock or land.

Redirect:

The rock there is gneiss rock, which is not penetrable by water like limestone.

Evidence closed.

By Mr. PURCELL: The defendant renews its motion for a nonsuit in this case on the grounds stated at the close of the plaintiff's evidence; and on the further ground that upon the uncontradicted testimony of the case it appears that there was no representations made by the defendant at the time of the sale of the bond in suit, which was known to the defendant to be false, or which this plaintiff acted upon to his damage.

98 Motion denied and defendant excepted upon each ground separately.

Charge to the Jury.

HISCOCK, *J.*:

Some time in the fore part of 1893 the plaintiff bought of the defendant a $500 bond issued by the Westchester County Water Works Company of White Plains. That bond has turned out not to be good.

It is claimed by the plaintiff that in making to him the sale of that bond the defendant through its president, Mr. Sherman, was guilty of fraud and deceit in making certain representations in regard to the character and value of the bond.

In order to recover in this case the plaintiff must establish by a fair preponderence of evidence three propositions. The first of those propositions will be that there were certain representations made by the bank through its president, Mr. Sherman, to him in regard to the character and value of the bond at the time he bought it, and upon which he relied in whole or in part in purchasing the bond.

That therefore is the first question for you to consider here,

whether any representations were made by Mr. Sherman, if so, what?

The plaintiff claims in that connection in substance this: That some time in April, 1893, having $500 to invest, he went into Mr. Sherman's office in the bank and told him that he had a little money he would like to invest, asked him if he knew of any
99 good thing in which he could invest it for a little while and get his interest; that Mr. Sherman said to him that he had some bonds under consideration which he thought were good and which he was going to have investigated.

Subsequently, about two weeks after that, the plaintiff again went to Mr. Sherman's office in the bank and Mr. Sherman then told him regarding these Westchester County Water Works Company's bonds, of which he bought one, that he had had a man, Mr. Parmelee, go down and investigate the matter and that the bonds were all right, first-class and as good as gold.

Then I think the bond was shown to the plaintiff or it was called to his attention in some way that it would not become due until some time after the year 1900. The plaintiff said he guessed he would not take it, he did not want to invest his money for so long a time, something of that sort.

Mr. Sherman further said to him that he would not market the bonds unless he knew they were all right; if the plaintiff took the bond that at any time he wanted the money he could bring it back to the bank and have his money for it.

That is the substance of his claim. I cannot recapitulate it word for word, but that is the substance of the claim as I remember it made by the plaintiff.

And in that connection, it is your memory that is to govern upon that subject, upon the subject of the evidence always, you are not to be governed or controlled by my statement. That is my
100 memory of it. If you recollect it differently, then you are to be governed by your memory. It is your province to remember the evidence.

The first question is whether these statements and representations were in fact made by the bank through its president, Mr. Sherman, to the plaintiff at the time he bought this bond and whether he relied upon such statements and representations in purchasing the bond.

Mr. Sherman is dead, and therefore cannot give any evidence upon that subject. And there is no direct testimony in this case to contradict the plaintiff's evidence in regard to what took place.

But there is a rule of law in that connection that where the evidence to sustain an action is given by a person who is interested in the event, in the issue of the action, that the jury is not bound to believe the evidence as a matter of course simply because it is not contradicted by some direct testimony of some other witness. The jury has the right to take into account everything that appears in the case, the appearance of the witness who has been upon the stand, the probability of the evidence as he has given it, and the other facts and circumstances as they appear in the case, and say from all

those whether it is probable that the matter took place as he says it did.

So it is for you in this case looking at it in that way to consider all the evidence that has been given here before you to determine whether the plaintiff's version of what took place at that time is truthful or not truthful, whether the representations and
101 statements were made or were not made. Of course if you make up your mind upon that point that there were no statements made by Mr. Sherman in regard to the kind and character of this bond, that the plaintiff is wrong in that respect, then that would end the case.

If, on the other hand, you should conclude that the statements were made at that time in substance as claimed by the plaintiff and upon which he relied in purchasing this bond, then you would reach the second point in this case, whether those statements were true or not.

Well, that involves the consideration of this water works company down in White Plains. There are certain facts here about which there is no dispute. It is conceded that at the time these statements are said to have been made that there was a prior mortgage upon this property which secured $100,000 of bonds then outstanding; that a mortgage was made under which this bond in question was issued providing for the issue of $200,000 of bonds, $100,000 of which were to be used to retire the first-mortgage bonds and the other $100,000 of which were to be floated in addition to the $100,000 then on the property. And then as a matter of fact the first $100,000 on the second mortgage or consolidated mortgage were not accepted by the holders of the first-mortgage bonds with which to retire them. And the second $100,000 provided for by the mortgage there was about $100,000 outstanding at this time.

So that at the time when this transaction took place there was outstanding $100,000 of first-mortgage bonds and another
102 $100,000 issued under this second mortgage, which were subordinate in their lien upon the property to the first $100,000.

You have had a general description of the village of White Plains, where these water works were located, and in reference to the way in which it has increased in population and in regard to the character of the town and its prospects, as bearing—because these considerations do bear materially—upon the question of what the water works were worth.

Then lastly you have had estimates made by witnesses called by the respective sides in regard to what this water-works property was actually worth which was covered by the mortgage securing the bond.

Upon the one hand there has been called by the plaintiff a witness—Mr. Pierce, I think his name was—who says that in his judgment in the year 1893 at the time these representations were made the property was worth about $78,448; and that he did not include in that valuation the value of the real estate which the company owned and which had been placed by another witness at about $5,000, a witness called by the plaintiff; and did not include in it the

value of the meters, which has been placed by one of the witnesses called by defendant at several thousand dollars, $13,000 to $15,000; and that he did not estimate in his valuation the franchise or water supply at anything.

Still another witness, Mr. Stratford, has been called who places the valuation at this same time upon the property at $68,000; and
103 he, in the same way, excludes from the computation the real estate, water supply and franchise, the water supply and franchise as not being good for anything, or not having a market value.

On the other hand there has been called here as the main witness at least by the defense on the subject of valuation Mr. Hinds, who states that in his judgment the property of the water company in 1893 was worth $340,000. He says that the material, plant, pipes, real estate, wells and that sort of thing, the mechanical plant was worth about $172,000 at that time, after taking out what had been put in between 1897 and 1893, and the franchise and water supply was worth $160,000 to $179,000 more, enough to make up to $340,000.

In addition to that you have presented to you here the franchise under which the company was operating, and also the contract between it and the village of White Plains, which gave the village of White Plains the right at any time after five years to take this property by paying what it would cost and not exceeding ten per cent. in addition.

It appears as a matter of fact that subsequently the village of White Plains did take the property under a statute which was passed, by condemnation proceedings.

We are to consider the evidence, all of it, as bearing upon the value of these bonds, bearing in mind that there was this prior mortgage of $100,000 and that there was outstanding about $100,000 of the issue to which this bond in question belonged. You
104 are then to consider the value of this property and say what, as a matter of fact, those bonds are worth.

Of course the property and assets of the company would be applied first to the payment of the first issue of $100,000 before any of it could be applied to the payment of the subsequent issue.

If you should reach the conclusion that Mr. Hinds for instance is right in his calculation of value, that this property was worth at that time $340,000, why there was enough to pay off all the bonds which were outstanding, including the plaintiff's.

If on the other hand you should follow the values given by the witnesses for the plaintiff there was not sufficient property covered by this mortgage at that time to pay the first issue of bonds, to say nothing about the subsequent issue.

Upon that point again if you find that this property was sufficient at that time to amply pay these bonds, to pay these bonds in full, make them good, then there was nothing untruthful about the representations which are claimed to have been made by the bank through Mr. Sherman. Of course if there was ample property there to pay these bonds at the time, then the bonds were good, then they were all right and were a first-class security.

On the other hand, if you should reach the conclusion that at the

time when this transaction took place this property was not worth enough to pay this bond of which the plaintiff was the owner then you will reach the third question in this case, whether the
105 bank through its president, Mr. Sherman, was guilty of any fraud or deceit in making the representations at that time by which the plaintiff was induced to buy the bond.

This action, as has been stated, is based upon the theory of fraud or deceit. It is necessary in order to recover in the action that the plaintiff should convince you that there was intentional fraud or deceit in the representations which were made at that time. You must be satisfied by a fair preponderence of evidence that Mr. Sherman at that time did intend to exercise fraud in making these statements.

If you should be convinced that he simply expressed an opinion there could not be any recovery in this case whether that opinion was correct or not.

If you should reach the conclusion that he was simply careless in giving his ideas about these bonds or in looking them up there could not be any recovery in this case.

If you should reach the conclusion that in making these statements he relied upon information which had been given him and which sustained those statements there could not be any recovery in this case, although he had been careless in relying upon information, or although the information should have been untrue as a matter of fact. But you have got to find that there was something wrong about these representations, that there was fraud or deceit about them which entered into them when he made them.

106 There are two ways in which a man may be guilty of fraud or deceit in such a case as that. He may be guilty of fraud or deceit where he affirmatively and intentionally says what he knows is not true, where he actually and deliberately misrepresents the facts as he knows them to be, and tells them as he knows they are not. That is one way.

Another way in which a man may commit an act such as I have described is where he recklessly and without heeding what the result may be states a fact to be so and so without knowing whether it is or not. A man may be guilty of deceit in that way, by stating a fact to exist when he does not know whether it exists or not, and states it recklessly and heedlessly without regard to what the result may be.

The law says he may do it in either one of these two ways, and the rule upon the subject has been laid down very concisely and very plainly in a couple of cases decided by the highest court, the court of appeals, and I will read them as expressing the rule upon the subject; I read first from the 147 N. Y., page 129.

"The gravamen of the action is actual fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew it was false, or not knowing whether it was true or false and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. Mis-

judgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in
107 an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit."

And, again, by the same court, 153 N. Y., page 608: "An action to recover damages for dec-it cannot be maintained without proof of fraud as well as injury. Actionable deceit cannot be practiced without an actual intention to deceive, resulting in actual deception and consequent loss." But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does not act upon it to his injury, the result is actionable fraud."

So there you see are the two lines acting upon either one of
108 which a man may be guilty of such deceit or fraud as to sustain an action like this. It will be for you to determine in this case if you reach that point whether the bank acting through Mr. Sherman was guilty of fraud or deceit upon either one of those lines.

If you should find it was not, that Mr. Sherman was not guilty of fraud or deceit, then that again would end this case.

If on the other hand you shall find upon that third point again in favor of the plaintiff, then you will reach the last remaining consideration in this case, the question of damages.

The plaintiff would be entitled to recover if at all as damages the difference between what the bond would have been worth if as represented, that is as good as gold, or perfectly good, and what it was actually worth, what you shall find it was actually worth at the time.

If a man in selling a horse represents he is all right, and if the horse if all right would be worth one hundred dollars, and as a matter of fact he was not all right, but was only worth fifty dollars, the man would be entitled to recover fifty dollars, the difference between the two.

If the plaintiff is entitled to recover, he is entitled to recover the difference between the value of the bond as it was claimed to be

worth and its actual value as it was, as you actually find it to have been at the time.

That of course would lead you again to a consideration of what the bond was actually worth, which would involve again the
109 consideration of this evidence which has been given in regard to the value of the property and in regard to the prior lien.

You have also got in evidence here that nothing has been paid upon the bond since January 1st, 1896; since that time the company has been in default.

Mr. PURCELL: I ask your honor to charge that if at the time of the sale of the bond Mr. Sherman actually believed that the bond was a good and valid security, there can be no recovery even if it was then entirely worthless.

The COURT: I have charged you thoroughly upon that subject, and what I have said stands now in this connection. That request would be true unless Mr. Sherman purported to make a statement as of actual knowledge when he did not have knowledge on the subject. If he made the statement which was to the effect of a statement upon his personal knowledge when as a matter of fact he did not know anything about the facts, he would not be relieved from responsibility. But if he had received information which tended to support his statement which he made, and he relied upon information and belief, then he would not be responsible even though the statement were incorrect—even though the information had been incorrect. I think that with what I have already said covers the point.

Mr. PURCELL: Give me an exception to the charge as made and to the refusal to charge as requested.

110 Mr. PURCELL: I ask your honor to charge in that connection that the proof in the case shows that the statements made by Mr. Sherman as to the value of the bond were based upon information received by him from outside parties, and that therefore the law in that particular don't apply.

The COURT: I don't think I am prepared to charge just as you request, because according to the plaintiff's version of the conversion Mr. Sherman based his statements upon information which he had acquired through sending Mr. Parmelee down there to investigate the water works, and it now appears upon the trial that Mr. Parmelee did not go down to investigate the water works.

Mr. PURCELL: The plaintiff testified that he said he sent a man.

The COURT: He also mentioned Mr. Parmelee's name in that connection as I remember it.

Mr. PURCELL: Exception to the refusal to charge as requested and to the charge as made upon that subject.

Mr. PURCELL: I ask your honor to charge that it appears by the testimony of the plaintiff that he knew that Mr. Sherman based his statement as to the value of the bond as a security upon information he had received from other parties.

The COURT: I think the plaintiff did say in his evidence that he assumed or understood that Mr. Sherman was basing his statements upon information derived from Mr. Parmelee.

Mr. PURCELL: In that connection I ask your honor to
111 charge that if that be true then the rule of law as laid down by your honor in the main charge as to fraud which may be based upon a positive assertion of a fact recklessly and carelessly made, does not apply to this case.

The COURT: I don't think I will charge that. The plaintiff swears that Mr. Sherman told him that he had sent Mr. Parmelee down there to investigate and Mr. Parmelee says he didn't go down to investigate, so I think there is something for the jury to consider there.

Mr. PURCELL: I except. And I ask your honor to charge that whether Parmelee had gone down there or not at that time, that if Mr. Sherman acted upon other information then the rule of law as to the positive assertion of the fact which is not true don't apply in this case.

The COURT: I think I have already charged that. I have charged the rule that when a man makes a statement relying upon information which tends to support his statement, he is not liable, even though the statement were incorrect, even though the information was not reliable. I think that covers it.

Mr. PURCELL: I except. And I ask your honor to charge that there can be no recovery in this case unless it be shown that the representations made by the defendant were not only false and material but that when made the defendant through Mr. Sherman knew that they were false.

The COURT: I have already charged the rule to be that there are two ways in which fraud and deceit may be practiced; one is
112 by making statements which are known to be false, and the other by making statements which assume personal knowledge, when the person making them hasn't got any, when he makes them recklessly and heedlessly and without reference to what the result may be.

Mr. PURCELL: I mean this is the only rule which applies to this case, the one which I last requested.

The COURT: State it again.

Mr. PURCELL: That the rule of law applicable to this case is, that there can be no recovery unless it be shown that the representations made by defendant through Mr. Sherman were not only false and material, but when made Mr. Sherman knew that they were false.

The COURT: In view of the evidence which has been given by the plaintiff that Mr. Sherman purported to make his statement based upon information furnished by Mr. Parmelee, referred to as the cashier in the bank, and in view of the other evidence that now appears on the trial of the case that Mr. Parmelee has never been to examine the water works and therefore did not furnish any information, I decline to charge that as a matter of law.

Mr. PURCELL: I except to the refusal to charge as requested and to the charge as made.

The COURT: I desire to repeat again in view of one request which has been made and which is as follows: "We ask the court to charge that if at the time of the sale of the bond to plaintiff Mr. Sherman

actually believed that the bond was a good and valid security, there can be no recovery, even if at that time it was entirely worth-
113 less," that in order to incur a liability where the statement is not known to be false the person must make the statement upon the assumption and purporting to have personal knowledge, but without having it at all, and must make it heedlessly and recklessly and without care as to what the result may be. In other words I intend to reiterate the rule which I have read from the court of appeals reports upon that kind of deceit.

The jury retired and subsequently returned a verdict in favor of the plaintiff for $583.75.

The foregoing case and exceptions contains all the evidence given and proceedings had upon the trial of the above-entitled action.

PURCELL, WALKER & BURNS,
Defendant's Attorneys, 15 Washington Street, Watertown, N. Y.

It is hereby stipulated that the case and exceptions herein be settled as above.

Dated May 9, 1899.

ELON R. BROWN,
Plaintiff's Attorney.
PURCELL, WALKER & BURNS,
Defendant's Attorneys.

On reading and filing the foregoing stipulation, it is ordered that the foregoing case and exceptions be, and the same are hereby
114 settled and ordered filed in Jefferson county clerk's office and annexed to the judgment-roll herein.

Dated May 9th, 1899.

FRANK H. HISCOCK,
Justice of Supreme Court.

It is hereby stipulated by and between the attorneys for the respective parties that the foregoing notice of appeal, judgment-roll, and case and exceptions on appeal are true copies of the originals thereof entered and remaining on file in the office of the clerk of Jefferson county, and certification of the same by the clerk of said county is hereby waived.

Dated May 9th, 1899.

ELON R. BROWN,
Plaintiff's Attorney.
PURCELL, WALKER & BURNS,
Defendant's Attorneys.

JEFFERSON COUNTY, } ss:
City of Watertown, }

Henry Purcell, being duly sworn, says that he is one of the attorneys for the defendant, and that no opinion was given herein in the court below.

HENRY PURCELL.

Sworn to before me this 9th day of May, 1899.

M. L. FOLEY,
Com. of Deeds, City of Watertown.

115 STATE OF NEW YORK:

In Supreme Court.

At a term of the appellate division of the supreme court, held in and for the fourth judicial department, at the city of Rochester, on the 6th day of December, 1899.

Present: Hon. George A. Harding, presiding justice; Hon. William H. Adams, Hon. Peter B. McLennan, Hon. Alfred Spring, Hon. Walter Lloyd Smith, associate justices.

MOSES PETRIE, Respondent,
vs.
NATIONAL BANK AND LOAN COMPANY, Appellant.

The above-named defendant and appellant in this action, having appealed to the appellate division of the supreme court from a judgment of the supreme court and entered in the office of the clerk of the county of Jefferson on the 15th day of October, 1898, and
116 from an order made by said court, denying a motion for a new trial, and entered October 18, 1898, and the said appeal having been submitted by Messrs. Purcell, Walker & Burns, of counsel for the appellant, and having been submitted by Messrs. Brown, Carlisle & Hugo, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment and order so appealed from be and the same are hereby affirmed; and the respondent recover of the appellant the costs of this appeal. All concur.

NEWELL C. FULTON, *Clerk.*

In Supreme Court, Jefferson County.

MOSES PETRIE, Respondent,
vs.
NATIONAL BANK AND LOAN COMPANY, Appellant.
} Judgment of Affirmance, with Costs. Entered Dec. 8, 1899, at 4 p. m.

The above-named appellant, National Bank and Loan Company, Watertown, having appealed to the appellate division of the supreme court, fourth department, from a judgment of the supreme court entered in the clerk's office of the county of Jefferson, on the 15th day of October, 1898, and from an order made by said
117 court, denying a motion for a new trial, and entered October 18th, 1898, and the said appeal having been submitted by Messrs. Purcell, Walker & Burns, of counsel for the appellant, and having been submitted by Messrs. Brown, Carlisle & Hugo, of counsel for the respondent, at a term of the said appellate division, held at the court-house in the city of Rochester, N. Y., commencing on the

21st day of November, 1899, and said court having thereafter and on the 6th day of December, 1899, in all things affirmed said judgment and order so appealed from with costs; and an order to that effect having been duly entered in the county clerk's office of Jefferson county; and respondent's costs and disbursements having been duly taxed and adjusted by the clerk of the court at the sum of $98.30,

Now, on motion of Brown, Carlisle & Hugo, attorneys for the above-named plaintiff and respondent,

It is hereby ordered, that said judgment and order so appealed from be and the same are hereby in all things affirmed with costs, and that said plaintiff and respondent, Moses Petrie, recover of the above-named defendant and appellant, National Bank and Loan Company, of Watertown, the sum of $98.30, as and for his costs and disbursements of this appeal as taxed, and that he have execution therefor.

W. W. KELLY,
Deputy Clerk.

118 Supreme Court.

MOSES PETRIE
vs.
NATIONAL BANK AND LOAN COMPANY.

GENTLEMEN: Please take notice that the defendant in the above-entitled action, The National Bank and Loan Company, hereby appeals to the court of appeals of the State of New York from the judgment and order of the appellate division of the supreme court, fourth department, entered herein in the clerk's office of Jefferson county on the 8th day of December, 1899, affirming a judgment entered in said office on October 15th, 1898, for $784.31 damages and costs, in favor of the plaintiff and against the defendant herein, and that this appeal is taken from the whole and each and every part of said judgment and order of affirmance.

Dated January 3rd, 1900.

Yours, etc.,

PURCELL, WALKER & BURNS,
Attorneys for Appellant,
15 *Washington Street, Watertown, N. Y.*

To the clerk of Jefferson county, and to Brown, Carlisle & Hugo, attorneys for respondent, Watertown, N. Y.

119 Court of Appeals.

MOSES PETRIE
vs.
NATIONAL BANK AND LOAN COMPANY OF WATERTOWN.

JEFFERSON COUNTY, *City of Watertown,* } *ss:*

Henry Purcell, being duly sworn, says that he is one of the attorneys for the defendant in the above-entitled action, and that no opinion was given or filed herein by the appellate division of the supreme court, as he is informed by the clerk of the said court and verily believes.

HENRY PURCELL.

Sworn to before me, this 29th day of January, 1900.

M. L. FOLEY,
Commissioner of Deeds.

120 In Court of Appeals.

MOSES PETRIE, Respondent,
vs.
NATIONAL BANK AND LOAN COMPANY OF WATERTOWN, Appellant.

It is hereby stipulated, that the annexed and foregoing are true and correct copies of the original case and exceptions filed herein, pleadings, exceptions, judgment-roll, notice of appeal to the appellate division, order of the appellate division affirming the judgment herein, judgment of affirmance thereon, notice of appeal from said judgment to the court of appeals, and of all the papers and proceedings had in this action in the supreme court and the appellate division thereof and of the whole of said originals

It is further stipulated, that the county clerk's certificate as to the correctness of the said copies and papers mentioned be and the same hereby is waived.

Dated, January 29, 1900.

BROWN, CARLISLE & HUGO,
Respondent's Attorneys.
PURCELL, WALKER & BURNS,
Appellant's Attorneys.

Endorsed on cover: File No. 18,267. New York supreme court. Term No. 414. The National Bank and Loan Company of Watertown, New York, plaintiff in error, *vs.* Moses Petrie. Filed September 16th, 1901.

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JAN 16 1903
JAMES H. McKENNEY
WATERTOWN, N.Y.

Supreme Court of the United States.

~~No. 414. October Term, 1901.~~

The National Bank & Loan Company of Watertown, New York,
Plaintiff in Error,
vs.
Moses Petrie.

In error to the Supreme Court of the State of New York.

16

STATEMENT.

The plaintiff in error, the defendant below, is a National Bank, organized under the National Banking Act, doing business at the city of Watertown, N. Y. Mr. George H. Sherman was president of the defendant bank at the time of the alleged transaction. Mr. Sherman died in February, 1897, before the trial of this action. In 1893 the defendant in error left with Mr. Sherman at the bank $500 which he desired to invest for a few years. Such money was placed to the plaintiff's credit in the bank. Subsequently Petrie, the plaintiff below, purchased of the bank a bond of the Westchester County Water Works Co. for $500 and gave his check on the bank in payment for the same, dated July 1st, 1893. The plaintiff received

the interest on the same up to and including January, 1896, as the coupons became due. On or about the 9th day of July, 1898 (a year or more after the death of Mr. George H. Sherman), this action was commenced alleging fraud and misrepresentation by the defendant bank, as to the value of the bond so sold and delivered to the plaintiff in that it was a first-class security, just as good as gold and all right (p. 10). That the defendant in selling the said bond to the plaintiff was not acting within the scope of its authority under the National Banking Act and the laws of the United States, but was acting in violation of the laws and unlawfully had purchased the said bond for the purpose of speculation (p. 11). That plaintiff had tendered the defendant the said bond and demanded the face value of the same, which tender was refused. That said bond was of little or no value and the plaintiff had been damaged by reason in the sum of $500 and interest from 1st of January, 1896. The allegations contained in the complaint were denied by the answer; except the allegation therein that the defendant in selling said bond to the plaintiff was not acting within the scope of its authority under the National Banking Act and the laws of the United States, but was acting in violation of these laws and unlawfully and had purchased the said bond with others for the purpose of speculation; which was not denied and therefore was an admitted fact by the record. As a third defense, the defendant alleged that it was a national bank organized under the laws of the United States, that it is prohibited from dealing in

the kind of bonds or securities mentioned in the complaint; that the sale of the bond was without authority or consent of the defendant, not in the regular course of business, was wholly unauthorized, and was and is void (p. 14).

The issue so joined was brought to trial at a trial term of the Supreme Court of the State of New York, before a justice thereof and jury. At the trial, at the close of the plaintiff's evidence and also at the close of the evidence in the case before the submission to the jury, the defendant moved that the plaintiff be non-suited, among other grounds, that the transaction in question, to wit, the purchase and sale of the bond in question being prohibited by the National Banking Law, the defendant had no right or authority to purchase the bond and sell it to plaintiff, and therefore, so far as the defendant is concerned, the transaction having been conducted by Mr. Sherman, its president, he was not acting for it, the bank, and such transaction was absolutely void. The motion was denied and the defendant excepted. The jury rendered a verdict for the plaintiff for the par value of said bond and interest, on which judgment was entered. From the judgment so rendered, the defendant appealed to the Appellate Division of the Supreme Court, where such judgment was affirmed. From the judgment entered therein, an appeal was taken to the Court of Appeals, where the said judgment was affirmed.

ERRORS ASSIGNED.

The Defendant in Error, the plaintiff below, in

his complaint alleges, that the Plaintiff in Error, the defendant below, in selling the bond to the plaintiff, was not acting within the scope of its authority under the National Banking Act or the laws of the United States, but was acting in violation of these laws and unlawfully had purchased the said bond and others some time previous to the sale thereof to the plaintiff for the purpose of speculation, which allegation was admitted by the defendant, by not being denied, and thus the fact was established that the bond was bought for speculative purposes, and that such purchase and sale was unlawful. The defendant sets up in its answer a third defense to the action, that the defendant at the several times mentioned in the complaint was and still is a national banking association, duly organized under and by virtue of act of the Congress of the United States, entitled "An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved January 3, 1864; that under the statute of the United States, under and by virtue of which said corporation was organized, and was and is carrying on business, it was prohibited from dealing in the kind of bonds or securities mentioned in the complaint and the sale of said bond mentioned in the complaint to the plaintiff, was without the authority or consent of the defendant, and was not within the course of its regular business, was wholly unauthorized and was and is void (page 14).

At the close of the evidence on the part of the plaintiff the defendant moved that the plaintiff be nonsuited on the ground among others that the defendant being a national bank, was not bound by the action of Mr. Sherman, its president, in the purchase or sale of the bond in question, as the transaction is prohibited by the National Banking Act. That the purchase and sale of the bond in question being prohibited by the national banking law, the defendant had no right or authority to purchase the bond and sell it to the plaintiff, and therefore so far as the defendant is concerned, the transaction having been conducted by Mr. Sherman, its president, he was not acting for it, the bank, and such transaction was absolutely void. Again at the close of the evidence and before submission to the jury, the same motion was renewed, which motions were severally denied and the defendant duly excepted (pp. 36-59.)

Such refusal to nonsuit is the error asserted and intended to be urged. This error was urged in the Appellate Division of the Supreme Court and in the Court of Appeals of the State of New York, and by each of the courts was overruled and decided against the defendant.

POINTS OF LAW.

I.

The Plaintiff in Error, the defendant bank, in the court below was not liable for the acts of its officers in selling the bond in question to the Defendant in Error, the plaintiff in the court below,

as the buying and selling of bonds such as the one sold to the plaintiff was not within the scope of its corporate powers.

By the complaint and answer in this action, it is an established fact that in selling the bond to the plaintiff, the defendant was not acting within the scope of its authority under the National Banking Act and the laws of the United States, under which it was organized, but was acting in violation of those laws and unlawfully (p. 11), having purchased the said bond for purposes of speculation.

Such banking association, after organization, was authorized "To exercise by its Board of Directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange coin and bullion; by loaning money on personal security and by obtaining, issuing and circulating notes according to the provisions of this title."

Revised Statutes of the United States, § 5136, Sub. 7.

This statute has been construed by this Court as being an implied prohibition of the banking associations organized under the statute from dealing in stocks and bonds.

First Nat. Bank vs. Nat. Exchg. Bank, 92 U. S., 122-128.

Logan County Nat. Bank vs. Townsend, 139 U. S., 67-73.

California Bank vs. Kennedy, 167 U. S., 362-367.

Concord First National Bank vs. Hawkins, 174 U. S., 264-270.

Central Transportation Co. vs. Pullman Car Co., 139 U. S., 24.

The same doctrine is held in

McCormick vs. Market Bank, 165 U. S., 538-550.

II.

As the sale of the bond to the Defendant in Error was such a transaction as the Plaintiff in Error, the bank, had no authority to engage in, the bank is not responsible for the misrepresentations of its president at the time of the sale.

Weckler vs. The First National Bank of Hagerstown, 42 Maryland, 561.

(s. c.) 20 Amer. Rep., 95, 1 Thompson's National Bank cases, 533.

Which was case brought to recover from the bank on the alleged misrepresentations of the teller thereof on a sale of Northern Pacific railroad

bonds, which the bank was selling on commission. The purchase was made in October, 1871; the plaintiff collected the coupons due up to July, 1873, when default was made in the payment of the interest coupons. The Court says, on page 104 of the American Reports: "We are therefore clearly of the opinion that the business of selling bonds on commission is not within the scope of the powers of the corporation and the bank could not under any circumstances carry it on and being beyond the corporate powers the defense of the ultra vires is open to the appellant. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant by which she was induced to buy the bond in question."

So in the case at bar, it being a fact established by the pleadings that the bank in buying and selling the bond in question was engaged in a speculation and that such purchase and sale was illegal the defendant bank is not liable for any misrepresentation made by its president.

A similar decision was made by the Supreme Court of Pennsylvania. The president of the defendant bank received from the plaintiff $1,000 to be invested in the bonds of the city of Allentown. The plaintiff, not having received all of the bonds or a return of the residue of the money, brought suit against the bank. The Court held that the specified powers given by the statute nor the incidental powers necessary to carry on the business of banking do not extend to the dealing in bonds

and consequently that the bank was not responsible.

First National Bank of Allentown vs. Hoch, 89 Penn. St., 324.

(s. c.) 2 Thompson's Nat. Bank Cases, 375.

III.

The Defendant in Error knew at the time of the purchase of the bond from the Plaintiff in Error that the bank was engaged in a business which it had no authority to transact and in buying the bond of the bank he was acting at his own peril that it would turn out all right.

The Defendant in error alleges in the complaint that he bought the bond of the bank; that in selling the bond it was not acting within the scope of its authority but in violation of law (p. 11).

The Defendant in Error in dealing with the bank is presumed to know the powers of the bank and its officers and that such a transaction as the purchase and sale of bonds was not within the power of the bank.

Western Nat. Bank vs. Armstrong, 152 U. S., 346-352.

IV.

As the Defendant in Error and the Plaintiff in Error were equally objects of legal censure in engaging in the transaction of the sale and purchase of the bond, they will be left where they have placed themselves.

> Nat. Bank of Xenia vs. Stewart, 107 U. S., 676-678.

The Defendant in Error alleges in his complaint that the transaction was illegal as not within the scope of the powers of the Plaintiff in Error and is therefore chargeable with actual knowledge of the illegality of the transaction. Besides, the presumption of law is that the Defendant in Error knew that in selling him the bond the bank and its officers were acting beyond the scope of the powers of the bank and that the transaction was illegal.

> Western Nat. Bank vs. Armstrong, 152 U. S., 346-352.

V.

The contract of sale being illegal as being ultra vires, and having been fully executed by both parties, neither party can claim anything under it and they will be left as the Court finds them.

Thomas vs. Railroad Co., 101 U. S., 71.

Pearce vs. Madison & I. R. R. Co., and Peoria R. R. Co., 21 How., 441.

The United States alone can question the validity of the transaction between the plaintiff and defendant.

Thompson vs. St. Nicholas Bank, 146 U. S., 240.

VI.

This court has jurisdiction to entertain this writ of error.

Logan Co. Nat. Bank vs. Townsend, 139 U. S., 67-72.

McCormick vs. Market Bank, 165 U. S., 538-546.

The Plaintiff in Error claimed an immunity under a statute of the United States and the decision was against such immunity.

The Logan County National Bank vs. Townsend, cited above, was almost similar to the case at bar and is conclusive on the question of

jurisdiction of this court to review the judgment of the New York court.

VII.

In this case the Defendant in Error was parti ceps in a transaction which he knew was illegal and contrary to the provisions of the statute of the United States, claims that he had suffered damage in the transaction and seeks to recover and has recovered in the courts below for such damage.

VIII.

The judgment should be reversed.

HENRY PURCELL and

JOHN LANSING,

Counsel for Plaintiff in Error.

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FILED
JAN 14 1903
JAMES H. McKENNEY,
Clerk.

ELON R. BROWN,
COUNSEL FOR DEFENDANT IN ERROR.
WATERTOWN, N. Y.

Supreme Court of the United States.

No. 166.—October Term, 1902.

THE NATIONAL BANK & LOAN COMPANY,
Plaintiff in Error,
vs.
MOSES PETRIE,
Defendant in Error.

Argument for Defendant in Error.

This is an appeal from a judgment of the Supreme Court of the State of New York, (p. 16), entered on the verdict of a jury (p. 15), which judgment has been affirmed by the Appellate Division, Fourth Deparment of the Supreme Court of that State, and also affirmed by the Court of Appeals. The judgment is for damages suffered by the defendant in error, the plaintiff below, by reason of the purchase of a five hundred dollar negotiable bond of the plaintiff in error, the defendant below, which purchase was induced by false and fraudulent representations made by the bank's officer, in relation to the value and nature of the bond. The judgment (p. 16) amounted at the date of its re-

covery, October 15, 1898, to $583.50 damages and $200.81 costs, a total of $784.31. This case is a companion case to the National Bank and Loan company, plaintiff in error, against Lillian Traver Carr, defendant in error, No. 165, upon this calendar.

The complaint (Fols. 3-7) sets forth the sale of the bond and representations made by the defendant's president, George H. Sherman, that it "was first-class security, just as good as gold and all right," and that the defendant "as a further inducement to the sale thereof, promised at any time that the plaintiff wanted the money thereon, to take the same back and pay the full face value thereof in cash to this plaintiff, and further stated to plaintiff that it had positive knowledge that the said bond was good, and that the property mortgaged to secure the said bond was ample security therefor, and for the issue of bonds of which the said bond was one." The answer (pp. 12-14) denies the complaint, alleges good faith in the representations made, and that the sale was made by Sherman, an officer of the bank, without authority. It also sets up as a defense that the bank exceeded its corporate power in making sale of the bonds.

FACTS.

The plaintiff testified (Fols. 19-20) to the following conversation with the President of the Bank: "Mr. Sherman, I have got a little money that I thought I would invest in something if I could get the interest on it for a few years; by and by I

would want the principal." Sherman said: "I have got some bonds here I am about getting—he either had or was going to send his man off down to White Plains to look it up and see as regards the value of the security of them really, what there was back of them; Sherman said, come in the next time you are out, by that time we will know all about it, I can tell you then." Petrie who had five hundred dollars with him left it with Sherman for safe keeping. Sherman placed it to Petrie's credit in the bank. When he called after a lapse of some weeks, Sherman said: "My man has been down there and looked it up and found these bonds are all right, first-class securities and just as good as gold." Petrie said: "Mr. Sherman, I don't know anything about these bonds; I am a farmer. If I take this bond, I have got to rely upon your judgment. After reading along he came to the bond running fourteen years before it became due. Petrie said, Mr. Sherman, I guess I don't want to have anything to do with that. I shall want my money. I don't want to be without this money fourteen years. Petrie started to leave. Sherman followed and said, Petrie you don't think for a minute I would put these bonds on this market without I knew they were first-class security and just as gôod as gold. Petrie said, it has to run a long time, I don't believe I want it, the time is too long; it don't come due until 1906. Sherman said, you bring the bond in here if you should want the money before it comes due, I will give you the money on it. Thereupon Petrie took the bond and paid for it."

At Fol. 22, cross-ex., Petrie swears that Sherman told him that he had sent his man Parmelee who was the cashier of the bank down to make the examination referred to.

Petrie was unable to fix accurately the time when the sale took place. This evidence was supplied from the testimony of the defendant's witness, Charles L. Parmelee, who showed that the bond was taken and paid for on July 1, 1893, (Fol. 65.) The bank had owned the bonds since March 20, 1893. (Fol. 73). Parmelee testified (Fol. 74): "I never went to White Plains. No one went there to investigate these bonds for the bank to my knowledge. The bank did not have any search of the Westchester County Water Works property. Before the purchase of the bonds, I had never seen a copy of the franchise of the Water Works Company in the village of White Plains, nor had the bank to my knowledge; or the contract of the Westchester County Water Works Company with the village of White Plains for the construction of water works. I was cashier of the bank during all this time. I did not have a copy nor did the bank have a copy of the first or second mortgage. I knew that there was a first and second mortgage. We knew that the bonds issued on the first mortgage were not in fact surrendered by the holders on the issue of the second mortgage. I understood that the first mortgage bonds were outstanding as first mortgage bonds, and that the first consolidated were in fact second mortgage bonds. I talked that over with Mr. Sherman."

The correspondence between the bank and the parties of whom it purchased the bonds was destroyed and could not be produced upon this trial. It had been destroyed by direction of the bank. (Fols. 74-77). Such papers were destroyed although it was known at the time that there was a difficulty in relation to the sale of these bonds. Fol. 77).

It appears that the bond for the value of which the suit was brought, was numbered 217 of the denomination of five hundred dollars, issued under a first consolidated mortgage upon the property of the Water Works Company, bearing date January 1, 1890, the principal payable July 1st, 1906, and the interest on January 1st and July 1st of each year at six per cent. per annum, and that said bond was one of a series amounting in all to two hundred thousand dollars, one hundred thousand of which was issued and one hundred thousand of which was reserved to take up a first mortgage then outstanding of one hundred thousand dollars (Fols. 16-18).

The first mortgage of one hundred thousand dollars is also set out. (Fol. 16). It was shown that after January 4, 1894, the Westchester County Water Works Company had failed to pay in full the interest due upon the consolidated bonds of which the plaintiff's bond was one. For 1894 and 1895 it paid part and gave security for the balance. After July 1st, 1896, it ceased to make any payments. (Fol. 29). The bank however continued to pay the plaintiff the amount of his coupons in full down to January, 1896. (Fols. 75-76).

The plaintiff's witnesses upon the trial testified that the entire plant by which these bonds were secured was not worth more than sixty thousand dollars, that being also its costs. (See testimony of Frank Pierce, pp. 23-27, Thomas Stratford, pp. 28-34, pp. 58-59; William L. Banks, pp. 34-37.

Plaintiff also gave in evidence the contract between the Water Works Company and the Village of White Plains and the franchise under which the Water Works Company furnished water in that village (Fols. 41-44) from which it appeared that the village had the right at any time after the expiration of five years to take over the plant by paying the cost thereof and ten per cent. additional. The bond purchased by the plaintiff was therefore wholly unsecured and without value. The case was submitted to a jury who gave a verdict for the plaintiff for the full amount of his claim.

POINTS.

I.

THE SALE OF THE BOND TO THE DEFENDANT IN ERROR HAVING BEEN INDUCED BY THE FALSE AND FRAUDULENT REPRESENTATIONS OF THE BANK'S OFFICER AS TO ITS NATURE AND VALUE, HE WAS ENTITLED TO RECOVER THE DAMAGES HE HAD SUFFERED BY REASON THEREOF.

Fairchild vs. McMahon, 139 N. Y., 290.
Rothchild vs. Mack, 115 N. Y., 27.
Daly vs. Wise, 132 N. Y., 306.
Hickey vs. Morrell, 102 N. Y., 454-463.

The bank had in fact owned the bond sold the defendant in error for a considerable time before Petrie had his first talk with Sherman about purchasing it. Sherman told Petrie that he was going to send the cashier of the bank, Parmelee, to White Plains where the property securing the bond was located, to make an investigation as to its value; and he afterwards told Petrie that Parmelee had made such an investigation, although none in fact had been made. Sherman said as a result of such investigation, he was able to tell Petrie that the bond was a first-class security, and as good as gold, and that he would not put out any security unless he, Sherman, knew it to be as good as gold. Not only had no inquiry been made as to the value of this bond by the

bank's officer, but no search had been made of the title of the mortgaged property by any one connected with the bank, and the bank's officers apparently possessed no accurate information in regard to the security except that they were informed that it was a second mortgage bond; but a second mortgage bond cannot be a first-class security. The company issuing the bond made default in the payment of interest soon after it was acquired by Petrie, but the bank kept Petrie ignorant of the worthlessness of his security and the deception that had been practiced upon him, by itself advancing the money to pay the coupons, and taking and holding such coupons which were not redeemed by the Water Works company issuing the bond. This course kept Petrie quiet until the bank stopped paying the coupons, when an investigation revealed the facts set forth.

As to how far the statement made on the face of the bonds that they were "first consolidated bonds" was notice to the purchaser of the fact that they were in the first instance second mort gage bonds, see

Caylus vs. N. Y. K. & Syracuse R. R. Co.,
76 N. Y., 609, S. C. Below, 10 Hun. 295.

But as first consolidated bonds might be first first mortgage bonds, Sherman's representations would be binding in any case.

II.

IF THE JUDGMENT IS REVIEWABLE IN THIS COURT ON A FEDERAL QUETION THE PLAINTIFF IN ERROR MUST FAIL ON THE MERITS.

(A.) Having taken the money of the defendant in error on a contract of sale fraudulently induced by the false representations of Sherman, the bank cannot shelter itself behind any statutory limitations of the National Bank act, to escape answering to the defendant in error for the loss he has suffered. If the bank exceeded its authority in dealing in bonds, the penalty for so doing, could not be visited upon the defendant in error, for, if the bank had unlawfully acquired bonds, its first duty was to promptly dispose of them. That is the course usually pursued by the comptroller of currency with banks. Undesirable securities or securities not permitted by the banking law, must be promptly disposed of. If it were otherwise, the bank could never dispose of property which it had acquired in violation of the banking law.

LOGAN NATIONAL BANK vs. TOWNSEND, 139 U. S., 67, is fatal to the appellant's position. Townsend sold to a National Bank for sixty-eight cents on the dollar, $12,800 of bonds of a municipal corporation issued in aid of a railroad, under an agreement that the bank would upon demand return them to him at the same or a less price. Subsequently, he demanded compliance with this agreement, but the bank refused, setting up its want of authority to make the agreement. This defense

was overruled, the court holding that the National Banking Act does not give a National Bank the right to retain bonds coming into its possession under a contract which it was without legal authority to make, in disregard of provisions of the contract beneficial to the person dealing with the bank. Although the bank is not bound to surrender possession of them until reimbursed the full amount due to it, and may hold them as security for the return of the consideration paid, yet when such amount is paid or tendered, and the return of the bonds demanded, its authority to retain them no longer exists. It could not rightfully hold them by virtue of the contract, and at the same time refuse to comply with the terms of the purchase.

Weckler vs. First National Bank, 42 Md. 581, does not apply. In that case the bonds were not purchased by Weckler of the bank, but of an owner for whom the bank was selling as a sales agent on commission. While the bank acted in that capacity, one of the bank's officers, to effect the sale, made false representations, relying upon which, Weckler made the purchase and suffered loss. A recovery by reason of these false representations was denied by the Maryland court on the ground that the bank exceeded its corporate powers in acting as such sales agent. This doctrine even if sound has no application to the case at bar. The purchaser knew that he was dealing with the bank not as a principal, but as a sales agent only, and was bound to take notice of the law preventing the bank from acting in that capacity; while in the case at bar, Petrie was pur-

chasing of the bank, as the owner of the bond. If informed that the bank could not deal in bonds within its corporate power, this would not be notice to Petrie that the bank lacked power to dispose of bonds acquired by it in violation of the banking act. On the contrary, it would be apparent that in making a sale of such securities, the bank was bringing itself into conformity with its charter rights.

(B.) "Where the provisions of the National "Banking Act prohibit certain acts by banks "or their officers, without imposing any pen- "alty or forfeiture, applicable to particular "transactions which have been executed, "their validity can be questioned only by the "United States, and not by private parties."

Thompson vs. St. Nicholas Bank, 146 U. S. 240.

National Bank vs. Matthews, 98 U. S. 621.

National Bank vs. Whitney, 103 U. S. 99.

National Bank of Xenia vs. Stewart, 107 U. S. 676.

Thompson vs. St. Nicholas National Bank, 146 U. S. 240. In this case Thompson deposited with C., his broker, negotiable bonds as margin for purchases of stock. C. pledged the bonds to the National Bank as collateral security for any indebtedness he might owe the bank. While the bonds remained as collateral security for such indebtedness, the bank on the faith of the bonds, certified checks drawn on it by C., when C. had not on deposit in the bank, moneys equal in amount to the checks, in violation of the National Banking Act.

T. sought to recover his bonds from the bank as against an unlawful certification of checks, on the ground that the bank could not hold the bonds as security for a liability incurred by it in violation of such act. The right of the bank to the bonds as collateral security for the unlawful certifications was sustained, the court holding, that where the provisions of the National Banking Act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture, applicable to particular transactions, which have been executed, their validity can be questioned only by the United States, and not by private parties.

Little can be said for a logic or consistency which insists that the plaintiff in error as a National Bank cannot deal in bonds, under the limitations of its charter but if it does deal in bonds, as in this case, by selling to the defendant in error, and in so doing, commits a fraud, a recovery cannot be had against the bank for the damages suffered through its fraud.

(C.) The decision of the state court having proceeded upon a distinct ground not involving a federal question, and sufficient of itself to maintain a final judgment without reference to the federal question involved, the judgment should be affirmed.

Beaupre vs. Noyes, 138 U. S. 397.

Seeberger vs. McCormick, 175 U. S. 274-280.

Eustice vs. Bolles, 150 U. S. 361.

Pierce vs. Summerset Railway, 171 U. S. 641.

Remington Paper Co. vs. Watson, 173 U. S. 443.

The third point for the bank, viz., that Petrie knew that the bank was doing an unlawful business at the time he purchased the bond, is wholly without evidence to sustain it. While the complaint alleges the bank's unlawful dealing, this was a discovery made after the purchase, and as a part of the discovery that he had been imposed upon by Sherman's representations as to the bond. This is made clear by the testimony of Parmelee, cashier of the bank, who testifies at the top of page 44, "The last purchase of the consolidated bonds (one of which was sold to Petrie) was March, 1893." Petrie bought his bond July 1, 1893 (p. 42), so the bank had owned the bond from March until July first before Petrie purchased.

While the bank had no right to acquire the bond for speculative purposes, it might have acquired it lawfully under a pledge, and it would be carrying the doctrine of *ultra vires* to an extreme limit to hold that a farmer about to purchase a bond of the bank, was put upon inquiry as to whether a bank acquired an asset lawfully or unlawfully, which it might have acquired lawfully in the ordinary course of business. As shown elsewhere in the brief, even if he had been informed that the bank had acquired it unlawfully, this would not have prevented the bank from disposing of the forbidden asset, as the duty rested upon it to get rid of the unlawful asset. The case might have been different had the bank undertaken to acquire the bond in the market for Petrie.

III.

This appeal should be dismissed for want of jurisdiction, since this is not a case covered by Section 25 of the Judiciary Act, or Section 2 of the Act of February 5, 1867, "Where any title, right, privilege or immunity is claimed under * * * * any statute of * * * * * or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party."

Walworth vs. Kneeland, 15 How. U. S. 348.
Udell vs. Davidson, 7 How. 269.
Conde vs. York, 168 U. S. 642.

Walworth vs. Kneeland, 15 How. U. S. 348. In this case the plaintiff in error had been commanded in a decree for specific performance, to convey to the defendant in error, a quarter section of land in Wisconsin, pursuant to a contract made between the parties in violation of the laws of the United States, relating to public lands and Walworth, the plaintiff in error, sought to reverse the decree in this court on the ground of the invalidity under the United States laws of the contract which was being enforced against him in a State Court. Chief Justice Taney says: "It is due to "the State Court to say that, in its decree, it "declares that such a contract would be void; "and it decreed in favor of the complainants "upon the ground that it was not proved by "legal testimony, that either Frisbee or Ar- "nold had undertaken to associate them-

"selves with the illegal combination of set-
"tlers, or to use any other unlawful means,
"to enable Walworth to buy the land in ques-
"tion at a reduced price.

"But if it had been otherwise, and the
"State Court had committed so gross an er-
"ror as to say that a contract, forbidden by
"an act of congress, or against its policy, was
"not fraudulent and void, and that it might
"be enforced in a court of justice it would not
"follow that this writ of error could be main-
"tained. In order to bring himself within the
"25th section of the act of 1789, he must show
"that he claimed some right, some interest,
"which the law recognizes and protects, and
"which was denied to him in the State Court.
"But this act of Congress certainly gives
"him no right to protection from the conse-
"quences of a contract made in violation of
"law. Such a contract, it is true, would not
"be enforced against him in a court of jus-
"tice; not on account of his own rights or
"merits, but from the want of merits and
"good conscience in the party asking the aid
"of the court. But to support this writ of
"error, he must claim a right which, if well
"founded, he would be able to assert in a
"court of jutice, upon its own merits and by
"its own strength. No such right is claimed
"in the answer of the plaintiff in error. And
"indeed it would be a novelty in legislation
"and in public policy if Congress had taken
"so much pains to provide for the protection

"of persons who had combined with others
"to perpetrate a fraud on the United States,
"and found themselves in the end the suffer-
"ers by the speculation; or who, by the error
"of a state court, had been compelled to
"share its gains with their associates in the
"fraud. The right or interest claimed in the
"state court must be of a very different char-
"acter, to entitle him to the protection of the
"act of 1789. It has already been so decided
"in this court in the case of Udell and others
"vs. Davidson, 7 How., 769."

Conde vs. York, 168 U. S. 642. In this case, Witherby & Gaffney, a firm of contractors, doing government work, made an assignment of the contract price which they were to receive from the United States government, in violation of Section 3477 of the U. S. Revised Statutes, to York. Later the warrant was issued to Witherby & Gaffney who delivered it to Conde, in payment of a debt due him. York sued Conde in the State Court and Conde set up as a defense that the assignment to York was prohibited by Section 3477, U. S. Revised Statute. The court held, Chief Justice Fuller writing the opinion, that in order to give this court jurisdiction to review the judgment of the state court against the title or right set up or claimed under a statute of or an authority exercised under the United States, that title or right must be a title or right of the plaintiff in error, and not of a third person only; and the statute or authority must be directly in issue. The controversy was merely as to which of the claimants had

the superior equity in the fund; the statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it. The writ of error was therefore dismissed.

McCormick vs. Market Bank, 165 U. S., 538, is not in conflict with the foregoing cases. In that case, the bank, before a certificate authorizing it to do business had been issued by the comptroller of the currency, made a five years' lease of a banking house. The certificate was never issued, and in an action by the lessor to enforce the lease, it was held that the bank had exceeded its corporate powers in making the lease, and could only be held under the contract for the time it had been in actual possession. The jurisdiction of this court was sustained on the ground that the plaintiff in error claimed that the United States statute gave the defendant in error power to enter into the lease, and by the judgment of the state court, the plaintiff in error had been deprived of a right accruing to him under this contract by reason of the statute. The plaintiff in error afterwards recovered judgment in an action against the incorporators of the bank. (Seeberger vs. McCormick, 75 U. S. 274) on their liability as agents guaranteeing the authority of their principal by reason of their false assumption of corporate authority. The appeal was dismissed.

The judgment should be affirmed.

ELON R. BROWN,

Counsel for Defendant in Error,

Watertown, N. Y.

Supreme Court of the United States.

No. 166.—October Term, 1902.

The National Bank and Loan Company of Watertown, New York, Plaintiff in Error, *vs.* Moses Petrie. } In error to the Supreme Court of the State of New York.

[March 9, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action to recover money paid to the plaintiff in error for certain bonds. One defense set up in the answer was that the bank was a national bank, and that the sale of the bonds was without the authority of the bank, and was illegal and void. Judgment went against the bank, it was affirmed by the appellate division of the Supreme Court and by the Court of Appeals, and the case now comes here by writ of error. The ground of the action is that the sale was induced by false representations of the president of the bank. We do not state these particularly, because the findings and rulings of the State court with regard to them are not open. We have to deal with no question except the defense attempted under the United States statute, and therefore need not inquire whether they contained a stronger infusion of fraud than is allowed to vendors in the way of praising their wares.

As we are of opinion that the defendant in error is entitled to keep his judgment, it does not matter so much as otherwise it would whether the result is reached by a dismissal of the writ, on the intimation of *Walworth* v. *Kneeland*, 15 How. 348, 353; see *Conde* v. *York*, 168 U. S. 642, 649, or by an affirmance of the judgment. We shall assume that the defense under the statute was such a claim of immunity as to entitle the plaintiff in error to come here. *Logan County National Bank* v. *Townsend*, 139 U. S. 67, 72; *McCormick* v. *Market Bank*, 165 U. S. 538, 546. On that assumption, however, we do not perceive how the defense is made out on the record. The complaint, to be sure, alleges that the bank was acting unlawfully in selling the bond, but it does not appear that Petrie knew the fact, and it would be a strong thing to charge him with notice or a duty to make inquiries as to how the bank was conducting its business, or to make the validity of the sale depend upon the fact alone, irrespective of the purchaser's knowledge. See *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal. 543, 578, 579; *New York & New Haven Railroad* v. *Schuyler*, 34 N. Y. 30,

73; *Madison & Indianapolis Railroad* v. *Norwich Saving Society*, 24 Indiana, 457, 462. The sale might have been lawful. It was not necessarily wrong. *First National Bank of Charlotte* v. *National Exchange Bank of Baltimore*, 92 U. S. 122, 128. However, we need not stop at this preliminary difficulty or another suggested by the answer, on which no point was made. The answer alleges that the sale was without the authority or consent of the bank, and was not within the course of its regular business, which looks a good deal like an attempt to deny that there ever was an effective sale and yet to keep the price.

The declaration goes upon a rescission of the contract. It contains ambiguous language, but the allegation of tender of the bond and that the tender still is kept good make the ground sufficiently clear. The question then is, leaving on one side the averment just quoted from the answer, and assuming that the parties were attempting a transaction forbidden by the law, whether the nature of the attempt prevents one of them from withdrawing from the bargain on the ground of preliminary fraud. If the withdrawal were on the ground of repentance alone the law might, or might not, leave the parties where it found them. See *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 60, 61; *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 150. But a person does not become an outlaw and lose all rights by doing an illegal act. See *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual conseqnence is that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object because he has brought about the other's consent by wrong. See *Pullman Palace Co.* v. *Central Transportation Co.*, 171 U. S. 138, 151. It is true that the fraud was perpetrated by an agent, and it is argued that he did not represent the bank for an illegal act. But unless this means that there was no sale, as the answer and a part of the argument seem to suggest, in which case, of course, Petrie must have his money back, the answer is that if the bank relies upon the sale it must take it with the burden of the fraud. It must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest. Cases where the action is on the illegal contract do not apply. Such was *First National Bank of Allentown*, v. *Hoch*, 89 Penn. 324. Here the attempt is to recover outside of it, treating it as set aside. An action for damages caused by fraudulent representations which

induced a contract, affirms the contract and relies upon it, *Whiteside* v. *Brawley*, 152 Mass. 133, 134, and therefore may be subject to the same defenses as an action brought directly upon the contract. *Weckler* v. *First National Bank of Hagerstown*, 42 Md. 581, 595, 597, seems to have been an action of this character in respect of a sale on commission by the bank. We express no opinion as to an action of that kind. See *Thompson* v. *Saint Nicholas National Bank*, 146 U. S. 240, 251; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364. But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract, and that party must take it as it was made. The record discloses no error re-examinable here.

Judgment affirmed.

Mr. Justice McKenna took no part in the consideration and disposition of this case.

The National Bank and Loan Company of Watertown, New York, Plaintiff in Error, *vs.* Lilian Traver Carr. } No. 165.

This case is similar in substance, pleading and argument to the foregoing, with the additional fact that the president of the bank acted as the confidential adviser of the defendant in error and did not reveal to her that the bonds belonged to the bank or that he was on both sides of the transaction and interested against her. As soon as she found out that the bank was the seller she repudiated the sale.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.